82-2054



NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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CLAUDE V. FALKENHAN,

Appellant

V.

COMMONWEALTH OF PENNSYLVANIA ,

Appellee

---

ON APPEAL FROM PENNSYLVANIA SUPREME COURT

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# JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

1. By statute, Pennsylvania established a Superior Court, which "shall consist of 15 judges," and gave that Court power to hear my initial appeal from a trial judge's conviction of summary criminal contempt, but those empowering statutes have been interpreted to permit decision of such initial appeals by fewer than all of Superior Court members, usually by a "panel" of three judges. When I took my appeal from my own conviction of contempt, I had several other appeals pending before Pennsylvania Superior Court, all or almost any of which would have shown the running, bitter controversy between me and the trial judge which I claimed entitled me to trial of contempt before another judge. The panel which Pennsylvania Superior

court assigned to my own appeal was not aware of those other cases, and accepted the trial judge's declaration that there was no such running, bitter controversy and so concluded that the trial judge was within his rights and power to convict and sentence me. Was that a denial of my federal Constitutional right to due process of law and the equal protection of the laws, directly and because Pennsylvania by Constitution provides a right "to apply to those invested with the powers of government for redress of grievances and for other proper purposes" (Article 1, Section 20) and rights against denial or discrimination of civil rights (Article 1, Section 26), and honors those rights in most instances?

2. Pennsylvania Supreme Court upheld Pennsylvania Superior Court's sua sponte

construction of Pennsylvania contempt and sentencing statutes as requiring that criminal contempt be punished by imprisonment, not by fine alone. Do those statutes so construed violate my federal Constitutional rights to due process of law, the equal protection of the laws, against unreasonable seizure, against cruel and unusual punishment, and not to be placed twice in jeopardy of law, directly and in that Pennsylvania by Constitution provides those rights and further forbids suspending of laws "unless by the Legislature or by its authority" (Article 1, Section 12) and honors those provisions in most instances?

3. Was it a violation of my rights to due process of law that the trial judge's sentence against me of a fixed fine only was vacated, and the case remanded for the imposition of sentence which might

include imprisonment?

4. Pennsylvania statutory contempt law was construed against me to include, as punishable contempt, my advising my client that he had a right not to testify at all in criminal contempt proceedings against him and supporting his efforts to claim that right, and my advising him not voluntarily to attempt to defend criminal proceedings against himself in the absence of a statement of charges. Was that a violation of my rights to due process of law, the equal protection of the laws, and not to have impaired my contract with my client that I should defend him, directly and in that Pennsylvania by Constitution provides similar protections and in most instances honors them?

5. Was the denial to me in summary criminal contempt proceedings of

notice and statement of the charges against me, time to prepare my defense, the assistance of counsel, jury trial, confrontation of the witnesses against me (including the trial judge), and compulsory process for obtaining witnesses in my favor a violation of my federal Constitutional rights thereto and also a violation of my rights to due process of law, the equal protection of the laws and the privileges and immunities of citizenship in that Pennsylvania affirmatively provides those rights by its own Constitution and honors them in most other situations and cases?

6. Was my conviction of summary criminal contempt a denial of my federal Constitutional rights to petition the government for redress of grievances and also a violation of my right to due process of law, the equal protection of

the laws and the privileges and immunities of citizenship in that Pennsylvania affirmatively provides that right by its own Constitution and honors it in most other situations and cases?

7. Was my sentence of $1,000 cruel and unusual punishment for attempting to protect my client's criminal procedural rights and also a violation of my right to due process of law, the equal protection of the laws and the privileges and immunities of citizenship in that Pennsylvania affirmatively guarantees against infliction of cruel punishment by its own Constitution and honors that right in most other situations and cases?

8. Pennsylvania by statute gives to alleged indirect criminal contemnors rights to be notified of the accusations against them and a reasonable

time to make a defense, to jury trial, and to automatic disqualification of the judge sitting in the proceeding, when the alleged contempt arises from an attack upon the character or conduct of such judge, but does not affirmatively give those same rights to alleged direct criminal contemnors, and in my case denied them. Is that a direct violation of my federal Constitutional rights to due process of law, the equal protection of the laws, the privileges and immunities of citizenship, and to petition the government for redress of grievances, and is it a further violation of those rights to due process and equal protection in that Pennsylvania by its own Constitution provides rights to criminal defendants to demand nature and cause of the accusations against them, to prepare and mount a defense, to trial

before an impartial forum, to petition the government for redress of grievances, and rights against discrimination in the exercise of any civil rights, and honors all those same rights in most other situations and cases?

9. Pennsylvania's Constitution provides (Article 1, Section 15) "No commission shall issue creating special temporary criminal tribunals to try particular individuals or particular classes of cases." May Pennsylvania now tolerate the institution of summary criminal contempt without violating federal Constitutional mandates of due process of law, and the equal protection of the laws?

10. Pennsylvania by statute forbids branding as a contempt of court any "publication out of court respecting the conduct of judges, district justices,

other system or related personnel, jurors or participants in connection with any matter pending before any tribunal." That statute was construed here to allow Judge Kiester to convict and sentence me for contempt of a declaration only that "the record speaks for itself," with no further specification, though I had entered on the Butler Court's record allegations of misconduct of Judge Kiester and the Butler County Court Reporters, Prothonotary, Clerk of Courts and a District Justice. Was such a construction of the quoted statute (Pennsylvania Consolidated Statutes, Title 42, Sec. 4134(a)) a violation of my federal Constitutional rights of due process and equal protection?

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## REPORTS OF OPINIONS

To the best of my knowledge, Pennsylvania Supreme Court's brief Order (A 2) denying my appeal has not been reported, officially or unofficially. Pennsylvania Superior Court's opinion (A 3 - A 28) has not yet been officially reported in Pennsylvania Superior Court Reports, but is set out at 452 A.2d 750. Butler

Trial Judge Kiester's Memorandum Opinion (A 29 - A 40) was reported in the Butler County Legal Journal, Vol. 6, No.258, of March 20, 1981.

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GROUNDS FOR INVOCATION OF JURISDICTION

I believe this Court has jurisdiction under Title 28, United States Code, Section 1257(2). This is an appeal from conviction and sentence for summary criminal contempt and Pennsylvania Supreme Court entered its denial of my appeal to it on March 24, 1983. In so doing, that Court necessarily decided at least two new issues of the Constitutional validity of Pennsylvania statutes as construed in this case, which had arisen only after Pennsylvania Superior Court's decision of my initial appeal, along with the other issues which had arisen in the trial court. Those new

issues were whether the Pennsylvania Superior Court, in dividing itself into "panels" of only a few of its members each, and assigning my appeal to one such panel, denied my right to due process of law by blinding itself to other appeals and records which I had then before that same Court which showed the existence of a running, bitter controversy between the Trial Judge and me such as entitled me to that Trial Judge's recusal as I had demanded -- and secondly, whether Pennsylvania Superior Court could constitutionally vacate my sentence of a fine only and remand for a new sentence which could now include imprisonment. The lead case which requires recusal in a summary criminal contempt proceeding, of a trial judge before whom that contempt is alleged to have been committed when there is a running, bitter

controversy between that judge and the alleged contemnor is Mayberry v Pennsylvania,400 U.S. 455 (1971).

North Carolina v. Pearce, 395 U.S. 711 (1969) holds it a violation of due process to increase severity of sentence as a result of appeal.

I filed my Notice of Appeal, June 6, 1983 in Pennsylvania Supreme Court, by mailing that Notice to its Prothonotary, and that same day I sent a copy of that Notice of Appeal to the Prothonotary of Butler County Common Pleas Court, which now has the record.

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## CONSTITUTIONAL PROVISIONS, STATUTES, CASES

### UNITED STATES CONSTITUTION

Article III, Section 2[3] The trial of all crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Article VI, [1] All Debts contracted and engagements entered into, before the Adoption of this Constitution shall be as valid against the United States under this Constitution, as under the Confederation.

[2] This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT I [1791] Congress shall make no law respecting an establishment of religion, or prohibiting the free exchange thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV [1791] The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V [1791] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be put in jeopardy of life or limb; nor shall be compelled in

any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI [1791] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VIII [1791] Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV [1868] Section 1, All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PENNSYLVANIA CONSTITUTION

ARTICLE 1 DECLARATION OF RIGHTS

That the general, great and essential principles of liberty and free government may be recognized and unalterably established, WE DECLARE THAT--

Section 1. Inherent rights of mankind

All men or born equally free and and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Section 6. Trial by jury

Trial by jury shall be as heretofore, and the right thereof remain inviolate.

Section 8. Security from searches and seizures

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or thing shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Section 9. Rights of accused in criminal prosecutions

In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, the demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of

his peers or the law of the land.

Sec. 10. Criminal information; twice in jeopardy; eminent domain

No person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger, or by leave of the court for oppression or misdemeanor in office. No person shall, for the same offense, be twice put in jeopardy of life or limb; nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

Sec. 11. Courts to be open; suits against the Commonwealth

All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Sec. 12. Power of suspending laws

Now power of suspending laws shall be exercised unless by the Legislature or by its authority.

Sec. 13. Bail; fines and punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.

Sec. 15. Special criminal tribunals

No commission shall issue creating special temporary criminal tribunals to try particular individuals or particular classes of cases.
(Amended May 16, 1967).

Sec. 17. Ex post facto laws; impairment of contracts

No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed.

Sec. 18. Attainder

No person shall be attainted of treason or felony by the Legislature.

Sec. 19. Attainder limited

No attainder shall work corruption of blood, nor except during the life of the offender, forfeiture of estate to the Commonwealth.
(Amended May 16, 1967).

Sec. 20. Right of petition

The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.

Sec. 26. No discrimination by Commonwealth and its political subdivisions

Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.
(Adopted May 16, 1967).

STATUTES

Pennsylvania Judicial Code (Title 42, Pennsylvania Consolidated Statutes)

§ 541. Superior Court

The Superior Court of Pennsylvania shall consist of 15 judges. 1976, July 9, P.L. 586, No. 142, § 2, effective June 27, 1978. As amended 1980, June 11, P.L. 213, No. 63, §, imd. effective.

§ 742. Appeals from courts of common pleas

The Superior Court shall have exclusive appellate jurisdiction of all appeals from final orders of the courts of common pleas, regardless of the nature of the controversy or the amount involved, except such classes of appeals as are by any provision of this chapter within the exclusive jurisdiction of the Supreme Court or the Commonwealth Court. 1976, July 9, P.L. 586, No.142 § 2, effective June 27, 1978.

§ 4131. Classification of penal contempts

The power of the several courts of this Commonwealth to issue attachments and to inflict summary punishments for contempts of court shall be restricted to the following cases:

(1) The official misconduct of the

officers of such courts respectively.

(2) Disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court.

(3) The misbehavior of any person in the presence of the court, thereby obstructing the administration of justice.

1976, July 9, P.L. 586, No. 142, s 2, effective June 27, 1978.

s 4134. Publication out of court

(a) General rule.--No publication out of court respecting the conduct of judges, district justices, other system or related personnel, jurors or participants in connection with any matter pending before any tribunal shall be construed as a contempt of court on the part of the author, publisher or other person connected with such publication.

(b) Civil and criminal liability not affected.--If any publication specified in subsection (a) shall improperly tend to bias the minds of the public, or of the tribunal, other system or related personnel, jurors or participants in

connection with any matter pending before any tribunal, any person who may be aggrieved thereby may proceed against the persons responsible for the publication by appropriate civil or criminal action or proceeding as in other cases of wrongful publication.

1976, July 9, P.L. 586, No. 142, §, effective June 27, 1978.

§. 4135. Criminal Contempt

(a) General rule.--In all cases where a person shall be charged with indirect criminal contempt for violation of a restraining order or injunction issued by a court or judge, the accused shall enjoy:

(1) The rights as to admission to bail that are accorded to persons accused of crime.

(2) The right to be notified of the accusation and a reasonable time to make a defense, if the alleged contempt is not committed in the immediate view or presence of the court.

(3) (i) Upon demand, the right to a speedy and public trial by an impartial jury of the judicial district wherein

the contempt shall have been committed.

(ii) The requirements of subparagraph (i) shall not be construed to apply to contempts:

(A) Committed in the presence of the court or so near thereto as to interfere directly with the administration of justice, or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court; or

(B) Subject to 75 Pa.C.S. § 4108(c) (relating to non-jury criminal contempt proceedings).

(4) The right to file with the court a demand for the withdrawal of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge, and if the attack occurred otherwise than in open court. The demand shall be filed prior to the hearing in the contempt proceeding.

(b) Punishment.--Except as otherwise provided in this title or by statute hereafter enacted, punishment for a contempt specified in subsection (a)

may be by fine not exceeding $100 or by imprisonment not exceeding 15 days in the jail of the county where the court is sitting, or both, in the discretion of the court. Where a person is committed to jail for the nonpayment of such a fine, he shall be discharged at the expiration of 15 days, but where he is committed for a definite time, the 15 days shall be computed from the expiration of the definite time.

1976, July 9, P.L. 586, No.142, § 2, effective June 27, 1978. As amended 1978, April 28, P.L.202, No.53, § 10(53), effective June 27, 1978.

§ 9721. Sentencing generally

(a) General rule.-- In determining the snetence to be imposed the court shall, except where a mandatory minimum sentence is otherwise provided by law, consider and select one or more of the following alternatives, and may impose the consecutively or concurrently:

(1) An order of probation.

(2) A determination of guilt without further penalty.

(3) Partial confinement

(4) Total confinement

(5) A rine.

(Subsections (b) through (e) ommitted)

1974, Dec.30, P.L. 1052, No.345, § 1, effective in 90 days. As amended 1978, Nov. 26, P.L.1316,No.319,§ 1, effective Jan.1, 1979; 1980, Oct.5, P.L. 693 No.142, § 401 (a),effective in 60 days.

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STATEMENT OF THE CASE

I am a lawyer. I was summarily found in criminal contempt of court for advising my client to remain silent to a judge's questions from the bench when that client was also accused of criminal contempt, and for advising him not to attempt to defend a criminal proceeding until statement of the charges against him was made. I was convicted without statement of charges against me, chance to ask for recusal of the judge, time to prepare a defense, counsel, confrontation of adverse witnesses, compulsory

process to obtain witnesses for me, or jury trial though I asked for those things at first opportunity (A 82 - A 85). President Judge Kiester fined me -- $1,000 -- and immediately jailed me until I paid bond in the same amount (A 85). When I took my first appeal to Pennsylvania Superior Court, only a few members of that Court heard my case (A 3) -- though the Pennsylvania Legislature has ordered that "the Superior Court of Pennsylvania shall consist of 15 judges." (Pennsylvania Judicial Code 42 Pa.C.S. Sec.541, supra, at p.25.) Those few judges changed the results only to allow the trial judge to replace my fine with a prison term (A 26 - A 28). I appealed that result to the Pennsylvania Supreme Court, claiming in my PETITION FOR ALLOWANCE OF APPEAL that it violated my federal and Pennsylvania constitu-

tional rights so to increase severity of sentence as a result of my appeal, and further claiming that all the members of Pennsylvania Superior Court should have heard my case -- because I had several appeals from Judge Kiester then in front of that Superior Court (by chance, being heard by other panels of different judges) which appeals together showed the running, bitter controversy between Judge Kiester and me and which entitled me to be tried (and sentenced, if at all) by another judge, as I demanded. (See Judge Kiester's opinions prepared for those appeals beginning at A 41, A 53 and A 57.) If the whole Pennsylvania Superior Court had heard my case it could not have missed that point.

Results of those appeals, my second and third appeals to Pennsylvania Superior Court for Nemeth, may be seen at

Nemeth v. Nemeth, 289 Pa. Super. 334, 433 A.2d 94 (1981) and Nemeth v. Nemeth, __Pa. Super.__, 451 A.2d 1384 (1982). The whole Superior Court would doubtless also have remembered that I had sued President Judge Kiester's Court Reporter Bayuszik (who is quoted in my Affidavit filed in Nemeth's case and set out at A 104 - A 106) in Superior Court itself (Nemeth v. Bayuszik, Pennsylvania Superior Court, No.1167 Miscellaneous Docket (1980)) so that I could get the transcript necessary to Superior Court's decision in Nemeth's second appeal. Superior Court itself comments on the delay at 443 A.2d 95, and again in the third appeal at 451 A.2d 1388-1389. The whole Superior Court would also have remembered that I had sued President Judge Kiester's Prothonotary to force compliance with Pennsylvania procedural law -- Falkenhan v. Wise, 282 Pa. Super.

318, 422 A.2d 1135 (1980)

In more detail, my client, James McDeavi (James), was charged with criminal contemp of court in Butler County, Pennsylvania, in a standard Pennsylvania criminal actiсn (Hereafter referred to as the "criminal action"; its caption is Commonwealth of Pennsylvania v. James D. McDeavitt, Jr. -- Complaint No.36754 of 1980, Type C, No.501, Offense Tracking Number S 790326-9 It was never given a Butler County Docket Number, though I demanded for James that it be assigned one. Butler County Clerk of Courts Ronald D. Painter told me the Butler County Judges had forbidden him to accept the record of this action from District Justice O'Donnell and give it a Butler County docket number. Clerk Painter also refused to accept my formal praecipe of appearance and other pleadings which I presented for filing in that action after District Justice

O'Donnell had forwarded his transcript to the Butler County Court at what District Justice O'Donnell told me was the oral direction of the Butler County Judges.)

After that charge was brought and James was preliminarily arraigned, Butler County Court of its own volition issued an order in a civil action in which James was also party, setting an "Indirect Criminal Hearing On James D. McDeavitt." (A 94) There was no way to know just what charges the Butler Court had in mind to decide at the "indirect criminal hearing," but I suspected that the Butler Court meant to call James on in the civil action for the purpose of affording him only diluted criminal procedural rights, of a lesser order than would have been James's clear entitlement in the criminal action. Those rights still belonged to James under United States and Pennsylvania

law wherever he was tried for criminal contempt, but I knew from constant and fresh experience in the Butler Court (A 86 - A 94 sets out an example) that there was hostility and resistance to affording them. When District Justice O'Donnell refused James preliminary hearing, telling me that the Butler Court had ordered him so to refuse and then continuing his refusal even when I brought mandamus against him for James, and when the Butler Clerk of Courts refused to give the criminal action a docket number and accept my appearance and pleading in it, my suspicions were of course strengthened. My main concern was to secure those criminal procedural protections for James.

The time set for the "indirect criminal hearing" was December 8, 1980, two o'clock P.M. Before then I made various motions and pleadings, (one example is at A 95) seeking to secure a determina-

tion of the charges and issues for the unexplained indirect hearing, without success. James also had me take an appeal to Pennsylvania Superior Court, trying to require and secure a statement of charges before attempting to defend.

Before then I also conferred with James, and he decided not to participate voluntarily in the "indirect criminal hearing" until there should be a statement of charges and a chance to prepare a defense, all the moreso because, if he voluntarily participated in that unexplained hearing and it turned out to involve the same facts underlying the pending criminal action against him, James might lose or make less certain his safeguards in the criminal action--in which the Butler Court would be harder put to deny him those procedural safeguards. James determined to be present to observe whatever the Butler Court did,

so that he could stay informed of, and more effectively counter, any further violations of his rights which took place there.

Once Butler County Judge Kiester determined that James and his daughters and I were present in the courtroom as observers, he first called James forward to the bar, then dismissed James's daughters from the courtroom (giving no reason, but telling me --not James-- that it was "totally contemptible, inexcusable,, Mr. Falkenhan, to bring those children into this courtroom." A 70). Judge Kiester then had Mr. McDeavitt physically brought before the bar.

At this point, one of the few criminal procedural rights that James and I could still protect was his right to remain silent and not to testify against himself. I knew from prior experience (A 86 - A 94) that such a right might

need to be affirmatively and tenaciously asserted against questions and demands from the bench.

A Pennsylvania appellate case which came out of Butler County about that time, Smith v. Commonwealth ex rel. Southwest Butler County School District, 56 Pa. Commonwealth 320, 424 A.2d 1001 (1981) illustrates the difficulty and reminds that the right to silence is lost if not so insisted upon even against demand and order of the trial judge. I believed that James was very much in need of, and entitled to, the assistance and support of counsel to protect that right, so I continued to advise him not to testify even as Judge Kiester proceeded to interrogate him. Judge Kiester held that criminal contempt (A 81), though I had cited him Maness v. Meyers, (419 U.S. 449 (1975)) for the proposition that it was no contempt to support my client's

Fifth Amendment right to silence in criminal proceedings against him (A 74).

After the finding and before imposition of sentence Judge Kiester offered me allocution (A 82) and I took this first opportunity to demand statement of charges against me, time to prepare my defense, liberty in the meantime, opportunity to be heard before the finding, jury trial, bail, and the full measure of my criminal procedural rights generally (A 83 - A 84). It was all after the fact of conviction, and all ineffectual, but it was all I was given opportunity to do. Judge Kiester then imposed a fine of $1,000 upon me (A 85 and A 28). I was taken away from the courtroom, and thereafter Judge Kiester had his will with the now-lawyerless James, sentencing him to Butler County Prison pending posting of an ordered bond.

That happened on the afternoon of

December 8, 1980. In the morning of that same day, my running controversy with Judge Kiester, which had always tasted bitter at least to me, had already boiled over again. At a hearing at which I represented him, my client Douglas Nemeth was jailed for alleged contempt for the second time by Judge Kiester (whose Opinion describing that is set out at A 53), but not before I had on that same morning, and for the first time in formal written pleadings, directly accused Judge Kiester of bald refusal to obey the law in administering the law (A 102), and had, also on that same morning, separately and by my own Affidavit of record in Nemeth's action accused Judge Kiester and Judge Dillon, the other Butler County Judge, of unlawful interference with preparation of transcripts by Butler County Court Reporters (A 103 - A 108),thus making what should be public record their

private preserve, and shielding their doings from appellate review. ( How effectively they do shield themselves from appellate review appears at Com. v. Scott, 276 Pa. Super. 478, 419 A.2d 558 (1980) and Com. v. Scott, again at 279 Pa. Super. 441, 421 A.2d 281 (1980), and also in Superior Court's recent Opinion in Nemeth's third appeal, reported at __Pa. Super.__, 451 A.2d 1384 (1982).)

All the contentions set out above in QUESTIONS PRESENTED were presented to Pennsylvania Supreme Court in a 47 page PETITION FOR ALLOWANCE OF APPEAL containing 35 "Questions Presented For Review" and supported by a 152 page Appendix. Pennsylvania Supreme Court of course would not hear that appeal, thus deciding all those issues sub silentio (A 2).

I really never got a chance to make

these demands to Butler County Judge Kiester -- his conviction of me was final before I was given a chance to speak about it (A 81) -- but I used his offer of allocution to make the demands I have already outlined (A 82 - A 84) and to demand the full measure of my criminal procedural rights. That I could not be more specific and scholarly under the circumstances is itself one of the consequences of denial of time to prepare a defense to specifically stated charges.

## REASONS FOR PLENARY CONSIDERATION

As my case now stands, all the rights I demanded for James McDeavitt and for myself are at risk of the institution of direct and summary criminal contempt, and all those rights exist only so long as individual trial judges are willing to recognize those rights and afford them to persons. If lawyers are given to understand that they risk jail for demanding any such rights for their clients whenever a trial judge indicates that his Honor does not want to hear of them, those rights will be silently erased. Lawyers will neglect even to claim them, even to inform their clients that those clients have such rights. At best, like hireling shepherds those lawyers will turn tail and run at the first sign of a judicial frown.

That situation should be confronted

and analyzed in detail, and lawyers given clear guidelines when and for which of their clients' rights they may insist even against a trial judge's overt demand for surrender -- especially while some precious Constitutional rights, such as that to silence against criminal accusations, are destroyed if once surrendered. Otherwise, we elevate summary criminal contempt above even the United States and State Constitutions themselves.

NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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CLAUDE V. FALKENHAN,

Appellant

V.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

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ON APPEAL FROM PENNSYLVANIA SUPREME COURT

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# APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX

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APPENDIX (continued)

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SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA

V. No.332 W.D. Allocatur Docket 1982

CLAUDE V. FALKENHAN,

Petitioner

ORDER

3/18/83

Petition Denied.

Per Curiam

3/24/83 Judgment entered.

COMMONWEALTH OF PENNSYLVANIA

V.

CLAUDE V. FALKENHAN, Appellant

Superior Court of Pennsylvania

Argued March 17, 1982

Filed Nov. 15, 1982

PETITON FOR ALLOWANCE OF APPEAL DENIED MARCH 18, 1983.

Before SPAETH, JOHNSON and HOFFMAN, JJ.

SPAETH, Judge:

This appeal is from a judgment of sentence for direct criminal contempt. The sentence was that appellant be committed to the county prison until he paid a fine of $1000.[1] Appellant argues: (1) that the evidence was insufficient to support a conviction of direct criminal contempt; (2) that in imposing summary punishment, the lower court abused its discretion; (3) that the lower court should have recused itself; and (4) that the sentence was manifestly excessive. We are not persuaded by the first three arguments, but we are by the last.

We therefore affirm the conviction

of direct criminal contempt but vacate the sentence and remand for resentencing.

Appellant is an attorney. On December 8, 1980, he was representing one James D. McDeavitt at a hearing before the lower court. The hearing started as follows:

THE COURT: Very well, this is the time fixed for hearing on the charge that James D. McDeavitt committed an indirect criminal contempt by violating the conditions of the order of October twenty-seven, nineteen eighty, entered under the Protection from Abuse Act.

You may call your witness.

MR. FOLAN: Thank you, Your Honor, Mr. McDeavitt--

THE COURT: Well, we don't seem to have the defendant in court.

MR. FALKENHAN [appellant] Right here he is Your Honor.

THE COURT: He may move up.

MR. FALKENHAN: We decline, Your Honor, thank you.

THE COURT: What is that?

MR. FALKENHAN: I say we decline.

THE COURT: You decline for what reason?

MR. FALKENHAN: Without going on the record of these proceedings, I and James McDeavitt doesn't-- the order under which this hearing is called this after-

noon is on appeal. The appeal was perfected this morning with the Prothonotary.

THE COURT: We will excuse the children from the courtroom.

MR. FOLAN: Notice of appeal was filed some time ago. I have no reason to believe the supersedeas was granted.

THE COURT: The court -- there has been no application for supersedeas. The court has granted no supersedeas. We will excuse the children from the courtroom.

This is totally contemptible, inexcusable, Mr. Falkenhan, to bring those children into this courtroom.

MR. FALKENHAN: As a separate record I will demand that if you-- (Mr. Falkenhan continues to speak at the same time as the court.)

TEH COURT: This is totally incomprehensible to this court, and I want that noted on the record. The defendant James D. McDeavitt will be seated at the counsel table. Let the record show that Attorney Falkenhan--Sit down. Sit down, Mr. Falkenhan.

MR. FALKENHAN: No, I will not, Your Honor, respectfully. I have my client's liberty to defend. He does not and I as counsel do not participate in these proceedings. You may do what you will,

but if he moves forward to the bar it is under the force and compulsion of the law, physical force. And when he does, it is because you drag him and not because he participates in these proceedings.

THE COURT: Let the record show that Attorney Falkenhan has directed his client not to appear at the bar of this court as a participant in these proceedings.

Very well, gentlemen, place Mr. McDeavitt at the counsel table.

All right, Mr. Falkenhan, there will be no comments from you aside during this hearing. If you have remarks, you will address them to the court.

MR. FALKENHAN: I assure the court if I have remarks intended to address the court I will do so, Your Honor.

THE COURT: You will not from the position you are in now. You will be silent throughout the entire proceeding.

Mr. McDeavitt, are you represented by counsel?

Mr. Falkenhan, I told you to be quite [sic].

MR. FALKENHAN: I will defend the liberty of my client. And I will instruct him from here and I will not move forward to the bar of your court lest that

implicate voluntary participation in this action. I have the liberty of my client to defend, and I will do so, Your Honor.

THE COURT: I told you you were not to address the court from that position. You will come to the bar of the court.

MR. FALKENHAN: Say nothing at all, ever, Jim.

THE COURT: Did you record that remark?

COURT REPORTER: Yes.

THE COURT: Be seated. N.T. 1-6.

The hearing continued in this fashion. Finally, the following occurred:

THE COURT: If you wish to--if you wish to represent Mr. McDeavitt in this hearing today you will be seated at counsel table.

MR. FALKENHAN: No, I don't, he and I are not participants. I represent Mr. McDeavitt in this action and my representation of this advice I give to him in this action is that he should not participate in the hearing called this afternoon in this action.

THE COURT: Very well, then, we will excuse you from the court toom.

MR. FALKENHAN: Thank you.

THE COURT: Mr. McDeavitt, this is a

criminal proceeding. You have a right to be represented by counsel. If you are without counsel and without funds to employ counsel, upon application to the court, the court will appoint an attorney to represent you in these proceedings.

MR. FALKENHAN: I instruct you--(Mr. Falkenhan continues to speak at the same time as the court.)

THE COURT: I have excused you from the courtroom, Mr. Falkenhan.

MR. FALKENHAN: I instruct my client--

THE COURT: You will leave the courtroom Mr. Falkenhan. You will be taken into custody.

MR. FALKENHAN: I instruct you not to answer any question and to assent to any question asked to you that it could be a violation--

THE COURT: The court finds Claude V. Falkenhan in contempt of this court. Take him into custody in the courtroom here until the court determines what to do with him.

N.T. 12-13

The court then took a recess. Immediately before recessing, the court advised Mr. McDeavitt of his right to

be represented by an attorney, and told him that if he could not afford an attorney, the court would appoint one. When the court asked Mr. McDeavitt whether he understood, Mr. McDeavitt refused to answer.

After the recess, the following occurred:

MR. FALKENHAN: I believe Your Honor had asked a question.

THE COURT: Do you wish to make a statement before sentence is imposed?

MR. FALKENHAN: Yes, I do. My first statement is sentence will be highly improper, in error at this time. My second is that if you charge me with anything I demand a full and complete statement of what it is you charge me with. My third is that I demand adequate time to prepare my defense. My fourth is that I demand my liberty in the meantime.

And I remind you in the order of court as spoken of in the judicial code section I think you have before me--or before you --I remind you that you must demonstrate that I had in fact interfered with the process of court if you even intend to charge me with summary criminal contempt. But I demand of you what it is-- I demand through my advice and participation in

counselling Jim McDeavitt this afternoon a statement of the charges against me, those and the opportunity to be heard. And I demand a jury trial of my peers because you have criminal contempt in mind. I can only--or at least I am entitled to suspect that because it carries the weightier penalties--until you tell me what it is in fact you charge me with. I remind you also that I am entitled to bail if you impose any sentence and punishment.

And I demand that, and more generally I demand all of what you know in your capacity as judge to be the criminal procedural rights, the criminal procedural rights in any charge against me and of every United States citizen and every Pennsylvania citizen.

THE COURT: The record speaks for itself, Mr. Falkenhan. Your conduct in the court this afternoon has been contemptuous. You have interfered with the process of the court. You have instructed your client to sit in the courtroom but not take his position at the bar of the court. You continued to conduct conversations with your client and others in the courtroom. You have interrupted the court. The record, the entire record speaks for itself.

The sentence of court is that you pay a fine of one thousand dollars for the use of the Commonwealth of Pennsylvania. You are committed to the Butler County Prison until such time as the fine has been paid.

MR. FALKENHAN: I demand to know how how--

THE COURT: At such time as the fine is paid you will be discharged.

MR. FALKENHAN: I will pay you no fine because if I pay your fine I alleviate my demand. Instead I demand to know what amount of bail will secure my liberty. I remind you that I have a right to bail, and I remind you that if you attempt to deny bail you must state on the record your reasons for denying me bail. I demand to know my bail.

THE COURT: The court fixes bail in this matter at one thousand dollars.

MR. FALKENHAN: Thank you, Your Honor.

N.T. 14-16.

The court then again advised Mr. McDeavitt of his right to be represented by counsel. Mr. McDeavitt again refused to answer whether he understood. The court then heard testimony from Mr. McDeavitt's

wife, Gail E. McDeavitt, to the effect that despite an order by the lower court, Mr. McDeavitt had not refrained from physically abusing or threatening her. When asked whether he wished to cross-examine his wife, and later, whether he wished to argue to the court, Mr. McDeavitt refused to answer. The court found Mr. McDeavitt in contempt, and imposed sentence and entered various other orders, the substance of which need not be stated here as they are not before us.

- 1 -

"Direct criminal contempt consists of misconduct in the presence of the court or misconduct so near thereto as to interfere with the immediate business of the court or disobedience to the lawful process of the court. Commonwealth v. Marcone, 487 Pa. 572, 579, 410 A.2d 759, 762-63 (1980)." In the Matter of Campolongo, 495 Pa. 627, 631 n. 4, 435 A.2d 581, 583 n. 4 (1981). "The purpose of imposing summary punishment for criminal contempt ... is the vindication of the dignity and authority of the court and the protection of the interests of the general public." In the Matter of Campolongo, supra at 631, 435 A.2d at 583.

Although the law has long recognized the inherent power of the courts to impose summary punishment for contemptuous misconduct, that power has been limited in this Commonwealth by Section 4131 of the Judicial Code:

> §4131. Classification of penal contempts
>
> The power of the several courts of this Commonwealth to issue attachments and to inflict summary punishments for contempts of court shall be restricted to the following cases:
>
> (1) The official misconduct of the officers of such courts respectively.
>
> (2) Disobedience or neglect by officers, parties, jurors or witnesses of or to the lawful process of the court.
>
> (3) The misbehavior of any person in the presence of the court, thereby obstructing the administration of justice. Id.495 Pa. at 631 32, 435 A.2d at 583 (footnotes omitted).

[1] Although the lower court did not say so in so many words, it is evident that the court regarded appellant's conduct as misbehavior in the presence of the court, obstructing the

administration of justice.[2] Accordingly, to be sufficient to support appellant's conviction, the evidence had to show, beyond a reasonable doubt, Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), appellant's misconduct in the presence of the court; his intent to obstruct the administration of justice; and actual obstruction. Commonwealth v. Reid, 494 Pa. 201, 431 A.2d 218 (1981).

[2] Appellant argues that the evidence was insufficient to show his intent to obstruct the administration of justice because it did not show that he had "tactically planned" his conduct. Brief for Appellant at 17. In appellant's view,his conduct was nothing more than "zealous advocacy on behalf of his client." Brief for Appellant at 11. This argument misconceives the sort of intent that had to be proved.

In Commonwealth v. Owens, 496 Pa. 16, 436 A.2d 129 (1981), the Court said:

> [A] subjective intent to obstruct the administration of justice is not a requisite element of criminal contempt. See, e.g., Commonwealth v.

Africa, 466 Pa. 603, 353 A.2d 855 (1976) (plurality). The requisite element of intent is satisfied if the contemnor had the intent to obstruct the proceedings. When that intent manifests itself in misconduct in the presence of the court which . . . in fact obstructs the administration of justice, criminal contempt has been committed.

Id. at 24, 436 A.2d at 133 (footnote omitted).

Here the evidence made plain appellant's intent to obstruct the proceedings. For example, among other statements made to the court was the following:

> He [appellant's client, Mr. McDeavitt] does not and I as counsel do not participate in these proceedings. You may do what you will, but if he moves forward to the bar it is under the force and compulsion of the law, physical force. And when he does, he does it because you drag him and not because he participates in these proceedings.
>
> N.T. 4.

It may well be that appellant was acting in good faith in the sense that he was attempting to protect his client.

But that is of no consequence. In Maness v. Meyers, 419 U.S.449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975), the Court said:

> [A]ll orders and judgments of courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect the remedy is to appeal, but absent a stay, to comply promptly with the order pending appeal. Persons who make private determinations of law and refuse to obey an order generally risk criminal contempt even if the order is ultimately ruled incorrect ... . While claims of error may be preserved in whatever way the applicable rules provide, counsel should neither engage the court in extended discussion once a ruling is made, nor advise a client not to comply. Id. at 458-59, 95 S.Ct. at 591 (citation and footnote omitted).

[3] Appellant also argues that the evidence was insufficient to prove an "actual obstruction" of the administration of justice. This argument has no merit. "[F]or conduct to be an obstruction of justice, it must interfere with and disrupt the orderly process of a court." In re Johnson, 467 Pa.

552, 558, 359 A.2d 739, 742 (1976). Appellant's conduct interrupted and delayed the hearing the lower court had scheduled. From the outset appellant refused the recognize the court's authority, over either his client, Mr. McDeavitt, or himself. While it is true, as appellant notes, that the "proceedings aginst [appellant's] client did, in fact, proceed to a conclusion," Brief for Appellant at 17, that occurred only after the delay caused by appellant's conduct, and then not in a satisfactory manner, for on appellant's advice, Mr. McDeavitt refused to participate in the hearing, thus depriving the court of the benefits to be realized from a properly conducted adversary proceeding.

Our conclusion that the evidence was sufficient to support appellant's conviction supported by other cases. See, e.g., Commonwealth v. Snyder, 443 Pa. 433, 275 A.2d 312 (1971) (defendant interrupted Commonwealth's closing argument and refused to behave in an orderly manner); Commonwealth v.Owens, supra (defendant repeatedly interrupted proceedings to request new counsel and express dissatisfaction with pro-

ceedings). Cf. In re Johnson, supra (attorney not in contempt when improper remarks during closing argument did not disrupt or delay trial); McMillan v. Mountain Laurel Racing Inc., 467 Pa. 266, 356 A.2d 742 (1976) attorney not in contempt for questioning court's ruling on cross-examination where discussion consumed less than one page of transcript).



[4] In imposing summary punishment the lower court did not abuse its discretion. As said in Commonwealth v. Marcone, 487 Pa. 572, 410 A.2d 759 (1980):

> In keeping with the gravity of a criminal contempt, the law has long recognized the need to provide the courts with the power to impose summary punishment for such conduct in appropriate situations....Summary action permits the court to eliminate the traditional steps involved in an adjudication .... Although this is a drastic departure from our traditional view of due process, its justification in the punishment of criminal contempt was well stated by Mr. Chief Just-

ice Taft in Cooke v. United States, 267 U.S. 517, 536, 45 S.Ct 390, 394, 69 L.Ed. 767, 773 (1925):

> We think the distinction finds its reason not any more in the ability of the judge to see and hear what happens in the open court than in the danger that, unless such an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public in the "very hallowed place of justice," as Blackstone has it, is not instantly suppressed and punished, demoralization of the court's authority will follow ...

Id. at 579-80, 410 A.2d at 763 (citations omitted).



The issue of when recusal is required was considered in Commonwealth v. Stevenson , 482 Pa. 76, 393 A.2d 386 (1978) (plurality opinion). After pointing out that summary proceedings for contempt are permissible--that is, that we tolerate the omission of the usual steps of service process, formal hearings, argument, and findings--because "the necessities of the administration of justice require

such summary dealing ... [as] a mode of vindicating the majesty of the law, in its active manifestation, against obstruction and outrage to it," Offutt v United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954), Justice POMEROY said:

> From the same necessity that in a proper case warrants summary punishment for contempt comes also the permissibility of the imposition of sanctions by the judge who heard and saw the misconduct. But when that necessity is absent, the reason for allowing the judge who has been the object of insult to preside over the hearing is also absent. As a constitutional matter, recusal is required when the record reveals a "running, bitter controversy" between the judge and the offender. Mayberry v. Pennsylvania, 400 U.S. 455, 465, 91 S.Ct. 499, 505, 27 L.Ed.2d 532, 540 (1971).

Commonwealth v. Stevenson, supra 482 Pa. at 91, 393 A.2d at 394.

[5] Here, the record does reveal a "running" controversy between the lower court and appellant. In its opinion the lower court states:

> In the past, Attorney Falkenhan has

deliberately used the system to subvert orders and avoid local rules promulgated to facilitate the work of the Court. His tactics have annoyed and frustrated both the Court, his opponents and their clients. It is no wonder that there seemed to be a unamimous approval by members of the bar of this order adjudicating Mr. Falkenhan in contempt.

Slip op. at 6.

Given this background, it might have been better if the lower court had recused itself. We do not believe, however, that recusal was required, for the record does not show that the controversy between the lower court, although "running" was "bitter." The court did not regard appellant's conduct directed at it. In its opinion the court states: "The conduct of Attorney Falkenhan was not direct at this judge personally. There was no personal insult intended." Slip op. at 6. Also, the court bore appellant no ill-will; it recognized that his motive was to serve his client, only condemning --quite properly, as we have discussed-- his judgment. Thus the court states:

I applaud the always vigorous and

well-prepared advocacy of Attorney Falkenhan. I deplore some of the tactics he employs. In this particular situation, it became apparent that Attorney Falkenhan planned to attack the constitutionality of the Protection from Abuse statute. Whatever may have been the objectives of his maneuver, his conduct disrupted orderly court procedure.

Slip op. at 7.

Finally, during the hearing appellant

Finally, during the hearing appellant

was treated fairly. He was held in contempt only after he had refused, either to represent his client by engaging in the hearing, or, if he chose not to represent his client, by remaining silent and not engaging in the hearing. On balance, we conclude that whether to recuse itself was a matter within the lower court's discretion, which it could have resolved either way. Compare, Commonwealth v. Reid, supra (recusal not required) with Commonwealth v. Patterson, 452 Pa. 457, 308 A.2d 90 (1973) (recusal not required) with Commonwealth v. Stevenson, supra (recusal required where personal insult to judge and no need to proceed summarily) and Commonwealth v. Africa, 466 Pa. 603, 353 A.2d 855 (1976) (same).

While appellant's conviction of direct criminal contempt was proper, the sentence imposed on the conviction must be vacated and the case remanded for resentencing. Although appellant's contempt was a criminal contempt, the lower court imposed the sort of sentence appropriate to a civil contempt. It thereby denied appellant procedural safeguards essential to a criminal procedeeding.

inal procedeeding.

As we have discussed above, the purpose of a criminal contempt is to vindicate the dignity and authority of the court and to protect the interests of the general public. The purpose of a civil contempt in contrast, is "to enforce compliance with an order of court for the benefit of the party in whose favor the order runs." Commonwealth v. Marcone, supra 487 Pa. at 577, 410 A.2d at 762.

[6] A consequence of these different purposes is that different sorts of sentences must be imposed. The distinctive feature of a sentence for civil contempt is that it is indeterminate: "The contumacious party need not stay in jail for any definite term; he may get out at will. He need only purge

himself of his contempt by complying or showing a willingness to comply with the court's order. This is classically expressed in the aphorism that the person imprisoned for civil contempt carries the keys to the jail in his own pocket."

In re Martorano, 464 Pa.66, 79 n.16, 346 A.2d 22, 28 n. 16 (1975) (quoting Dobbs, Contempt of Court: A Survey, 56 Cornell L.Rev. 183 at 237 (1971) footnote omitted)).

The distinctive feature of a sentence

The distinctive feature of a sentence for criminal contempt is that the sentence is "to a determinate term of imprisonment or a fixed fine." In re Martorano, supra at 80, 346 A.2d at 25. Since the essence of the sentence is not to coerce but to punish, the person sentenced must be "powerless to escape by purging himself of his contempt .. ." Id.

[7] Here, it will be recalled, the lower court imposed sentence as follows:

> The sentence of the court is that you pay a fine of one thousand dollars for the use of the Commonwealth of Pennsylvania. You are committed to the Butler County Prison until such time as the fine is paid.

MR. FALKENHAN: I demand to know now--

THE COURT: At such time as the fine is is paid you will be discharged.

N.T. 16

This sentence was not a proper sentence to impose for appellant's criminal contempt. It was, instead, a sentence for civil contempt; the fine was for the benefit of a party (the Commonwealth); and appellant could by paying the fine be discharged from the county prison--he

discharged from the county prison--he

"carrie[d] the keys to the jail in his own pocket."

There is a further difficulty arising from the lower court's failure to fix a definite term of imprisonment.

"Criminal contempt of court is a crime." In re Johnson, supra 467 Pa. at 557, 359 A.2d at 742. As such it may be punished by imprisonment. The Legislature has not, however, specified the maximum permissible term of imprisonment. 42 Pa.C.S.A. s 4132.

One accused of a "serious offense" is entitled to a jury trial. U.S. Const. amend. VI; Pa.Const. art.1, ss 6, 9. "The decisions of the United States have established a fixed dividing line between petty and serious offenses; those crimes carrying more

than six months sentence are serious and those carrying less are petty crimes.'" Commonwealth v. Mayberry, 459 Pa. 91, 98, 327 A.2d 86, 89 (1974) (quoting Codispoti v. Pennsylvania, 418 U.S. 506, 512, 94 S.Ct. 2687, 2691, 41 L.Ed.2d 912 (1974)).

When, as in Pennsylvania, the Legislature has not specified the maximum permissible term of imprisonment,

> then in order to determine whether a jury trial is required, a court must consider the sentence actually imposed .... If the sentence actually imposed is greater than six months, then the accused must be afforded an opportunity to be tried by jury .... Commonwealth v. Mayberry, supra 459 Pa. at 99, 327 A.2d at 90 (citing, inter alia, Codispoti v. Pennsylvania, supra).

Here, the sentence actually imposed might or might not result in appellant being imprisoned for more than six months. The lower court did not determine, and the record does not otherwise disclose, appellant's ability to pay the fine of $1,000 assessed as part of the sentence. As we have discussed, appellant could obtain his discharge from the county prison upon paying the fine. But he would not

be discharged until he paid it. If he was unable to pay the fine, therefore, under the terms of the sentence he would be imprisoned indefinitely, which is to say, he would have been denied his constitutional right to a jury trial--this being so quite apart from the impropriety of an indefinite sentence for criminal contempt.

[8] Since the case must be remanded for resentencing, one further observation is in order. Appellant having been convicted of a crime, In re Johnson, supra, his sentence must be imposed as required, not only by Commonwealth v. Mayberry supra, but also by the Sentencing Code, 42 Pa.C.S. § 9701 et seq. See generally, Commonwealth v. Riggins, 474 Pa. 115, 377 A.2d 140 (1977); Commonwealth v. Wicks, 265 Pa. Super. 305, 401 A.2d 1223 (1979) (collecting cases). See also Commonwealth v. Young, 299 Pa. Superior Ct. 488, 445 A.2d 1235 (1982); Commonwealth v. Doyle, 275 Pa. Superior Ct. 373, 418 A.2d 1336 (1979) If the lower court determines that a fine should be assessed, the court must determine among other matters, appellant's ability to pay the fine

and the burden that payment will impose. 42 Pa.C.S. § 9726.

The conviction of appellant of direct criminal contempt is affirmed. The judgment of sentence is vacated and the case is remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

1. At one time the Supreme Court had jurisdiction over appeals from final orders in direct criminal contempt cases. 42 Pa.C.S.A. § 722(4). However, jurisdiction is now in the Superior Court. 42 Pa.C.S.A. § 742.

2. In In the Matter of Campolongo, supra, the Supreme Court noted that the weight of authority is that an attorney is not an officer of the court within subsection 1 of Section 4131 of the Judicial Code. Id. 495 Pa. at 632 n. 7, 435 A.2d at 583 n.7.

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

COMMONWEALTH :
:
VS. : Ms.D.. 80-191
: B.42 P.317
CLAUDE V. FALKENHAN :

SENTENCE OF COURT

AND NOW, December 8, 1980, the court finds Claude V. Falkenhan in contempt

of this court. The sentence of the court is that he pay a fine of $1,000.00 for the use of the Commonwealth of Pennsylvania. Defendant is committed to the Butler County Prison until such time as the fine has been paid. At such time as the fine has been paid defendant will be discharged. The court fixes bail in the matter at $1,000.00.

BY THE COURT

GEORGE P. KIESTER
President Judge

blc

December 9, 1980, copy mailed to
Claude V. Falkenhan, Esq.

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA - CIVIL DIVISION

JAMES D. McDEAVITT, JR.,
Plaintiff

vs.

GAIL E. McDEAVITT,
Defendant

F.C. No.
80-1013-A2

COMMONWEALTH :

vs : Ms.D. 80-191

CLAUDE V. FALKENHAN : Book 42 Page 317

MEMORANDUM OPINION

Claude V. Falkenhan, an attorney at law, was adjudicated in contempt of court and sentenced to pay a fine of $1,000.00. The incidents occurred in a hearing on a contempt charge against James D. McDeavitt which the Court was conducting under the Protection from Abuse Act (as amended 1978, June 23, P. L. 513 effective in sixty days, 35 P.P.S.A. 10181, 10190). The action of the Court constituted summary punishment for contempt. The court considered Mr. Falkenhan's conduct to be direct criminal contempt.

HISTORY

Attorney Falkenhan represented James D. McDeavitt in proceedings on October 27,

1980, under the Protection from Abuse Act. At the conclusion of the hearing, the Court entered an order that provided inter alia for joint possession by the McDeavitts' of the residence, joint custody of the children, and counseling for the husband and wife. (N/T 165 etc.). Over the objections of Attorney Falkenhan, the Court refused to hear testimony from the children aged 4, 7, and 11, and told the parties and Attorney Falkenhan:

> ". . . You are going to destroy the love they have for each of you. One of the witnesses said that the conduct was irrational of Mr. McDeavitt. It certainly was, and apparently under the counsel and advice of you, Mr. Falkenhan. . . . . " (N/T 159 etc. 116, 117, 118).

On November 18, 1980, on the oral complaint of Gail E. McDeavitt and pursuant to the court order of October 27, 1980, Robert L. Elliott, Pennsylvania State

Police, arrested James D. McDeavitt without a warrant on a charge of "indirect criminal contempt." A judge being unavailable at the time, Mr. McDeavitt was arraigned before District Justice O'Donnell. A copy of the formal complaint, which Trooper Elliott made on information received from Mrs. McDeavitt, was returned and is part of this record. Mr. McDeavitt was released by District Justice O'Donnell on a One thousand dollar bond after a lengthy arraignment hearing and argument. The Court scheduled and on December 8, 1980, conducted a hearing on the charge that Mr. McDeavitt had committed "indirect criminal contempt" by violating the court order of October 27, 1980.

FACTS

On December 8, 1980, at an afternoon session, this judge opened Court with neither Mr. McDeavitt nor his attorney,

Mr. Falkenhan, at counsel table. Mrs. McDeavitt and her attorney, Mr. Folan, were seated. The spectator chairs behind the railing were filled. This was unusual and may be explained by the events at the arraignment of Mr. McDeavitt before District Justice O'Donnell.

It all began when the Court noticed that neither the Defendnat nor his attorney were present:

The Court: "Well, we don't seem to have the Defendant in Court."

Mr. Falkenhan: "Right here he is, Your Honor.

The Court: "He may move up."

Mr. Falkenhan: We decline, Your Honor, thank you." N/T2.

The colloquy between the Court and Attorney continued throug page 16 of the notes of testimony.

The facts were that Attorney Falkenhan

and his client had been seated with the McDeavitt children and others in the spectator section of the Courtroom. When the Court observed the children, he direct- that they be excused from the Courtroom.

At first this was ignored by Attorney Falkenhan. They were removed but when they were removed does not appear on the record. Attorney continued to stand and speak from the spectators' section. He instructed Mr. McDeavitt not to appear before the Court. Eventually the Court directed the bailiff to place Mr. McDeavitt at the counsel table. Before and while this was being done, Attorney Falkenhan was conversing with others in the spectators' section. This was quite obvious but the remarks could not be heard by either the judge or the reporter. They were not recorded. The Court instructed Mr. Falkenhan to be silent. Attorney Falkenhan ignored this instruction. From

behind the railing he continued to advise Mr. McDeavitt, as well as to speak and interrupt the Court.

Thereupon the Court advised Attorney Falkenhan to appear at the bar of the Court to answer the Court's charge that he was in contempt of Court. (N/T 6 etc.)

Attorney Falkenhan argued that he had not appeared for Mr. McDeavitt because there was nothing properly before the Court in the case of McDeavitt v. McDeavitt. It was his position that he represented Mr. McDeavitt in a criminal action. (He was referring to the refusal of District Justice O'Donnell to give Mr. McDeavitt a preliminary hearing on the contempt charge preferred by Trooper Elliott. Attorney Falkenhan filed a mandamus action in an attempt to force the district justice to schedule a preliminary hearing in the prosectution for contempt.) (N/T 6-12).

After listening to Mr. Falkenhan's argument and a repitition of his advice to Mr. McDeavitt to remain silent, the Court excused Attorney Falkenhan from the Courtroom. (N/T 12). Instead of leaving the Courtroom, Attorney Falkenhan continued to speak, to interrupt the Court and to advise Mr. McDeavitt.

The Court adjudicated Attorney Falkenhan in contempt of Court and recessed for fifteen minutes (N/T 13).

When Court reconvened Attorney Falkenhan was asked if he wised to make a statement. He did. (N/T 14, 15). The Court then sentenced Attorney Falkenhan to pay a fine of $1,000.00, and committed him to the Butler County Prison until the fine was paid. Bond was fixed at one thousand dollars. (N/T 16).

The hearing on "indirect criminal contempt charge" involving Mr. McDeavitt

continued after the Court again advised Mr. McDeavitt that he had the right to be represented by counsel. etc. (N/T 17). Mr. McDeavitt refused to answer and remained silent throughout the hearing as instructed by Attorney Falkenhan.

CONCLUSIONS

The Court is placed in the very difficult position of presenting the facts and justifying his action. There is no one to argue the trial Judge's position on the review of an adjudication for contempt.

In the past, Attorney Falkenhan has deliberately used the system to subvert orders and avoid local rules promulgated to facilitate the work of the Court. His tactics have annoyed and frustrated both the Court, his opponents and their clients. It is no wonder that there seemed to be unanimous approval by members of the bar of this order adjudicating Mr. Falkenhan in contempt. The conduct of Attorney

Falkenhan was not directed at this judge personally. There was no personal insult intended.

Whatever may have been the objective of Attorney Falkenhan, he succeeded in impressing his group of followers with his fearlessness and his disregard of court orders and procedure. If unpunished, the impact on the public and others (non-supporters of Attorney Falkenhan) could only be a loss of respect for the system of justice.

An attorney is always an officer of the court. He is supportive of the law, the rules and the procedures that guarantee every person due process and equal protection of the law.

When an attorney represents a client, he appears at the bar of the Court. He does not offer instructions to his client from a seat in the gallery while court is in session.

Conversations, remarks, distractions from spectators in a courtroom are disruptive and an affront to the dignity of courtroom proceedings. Formality and decorum are enforced by court staff. Attorneys who are observers as well as casual spectators are subject to courtroom discipline.

Those seated in the spectators' section of the courtroom are not participants in the proceedings. They are observers. If by word of action an onlooker attracts attention, that person may be warned and if the conduct continues, ushered from the courtroom. The rule applies to attorneys as well as lay apectators.

An attorney who instructs his client to ignore an order to appear before the Court and to await the use of force does not act in a professionally responsible manner. He interferes with, obstructs,

and impedes the administration of justice. He may subject himself and his client to prosecution for violation of the law.

I applaud the always vigorous and well-prepared advocacy of Attorney Falkenhan. I deplore some of the tactics he employs. In this particular situation, it became apparent that Attorney Falkenhan planned to attack the constitutionality of the Protection from Abuse statute. Whatever may have been the objectives of his maneuver, his conduct disrupted orderly court procedure.

The misbehavior of Mr. Falkenhan occurred in the presence of the Court and constituted direct criminal contempt. The fine of one thousand dollars was not unreasonable. It was nominal considering all the facts and circumstances.

BY THE COURT,

George P. Kiester,P.J.

Dated: January 22, 1981

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

GAIL E. McDEAVITT :
: F.C. No. 80-1013-A
vs.
: F.C. No. 80-1013-A-2
JAMES D. McDEAVITT:

MEMORANDUM OPINION

On October 27, 1980, this Court entered an order granting relief to Gail E. McDeavitt under the Protection from Abuse Act. (P.S. 35-10181) Inter alia the parties were granted joint possession of the family residence and joint custody of the children. James D. McDeavitt was ordered to refrain from physically abusing or threatening the said Gail E. McDeavitt. On the complaint of Gail E. McDeavitt and pursuant to both terms of the order and the provisions of the said Act of Assembly, James D. McDeavitt was arrested by the Pennsylvania State Police on November 18, 1980. He was arraigned on that same date

before William R. O'Donnell, District Justice on a charge of physically abusing and threatening to abuse Gail E. McDeavitt in violation of the court order, an indirect criminal contempt. (A judge was not immediately available to conduct the arraignment). Mr. McDeavitt was released on a $1000 cash bond that same date.

On December 8, 1980, a hearing was held before the Court on the charge that James D. McDeavitt had committed an "Indirect Criminal Contempt" in violation of the Order of October 27, 1980. The Court found Mr. McDeavitt guilty, revised the order of October 27, 1980, giving Mrs. McDeavitt exclusive possession of the family residence for six (6) months, principal custody of the children and ordered the defendant to post a bond in the amount of $2500 to insure compliance

with the order. Defendant was committed to the Butler County Prison pending posting of the bond.

On the advice of his attorney, Claude V. Falkenhan, Esquire, Mr. McDeavitt refused to participate in the hearing. At first, Attorney Falkenhan sat in the spectator's gallery with his client and coterie of supporters. Mr. McDeavitt moved to the counsel table at the bar of the Court after the Court finally ordered him moved there over the objections of Attorney Falkenhan.

The tactics employed by Attorney Falkenhan in representing his client may be explained by the record and the several written "suggestions" presented to the Court. Attorney Falkenhan stated:

> "I am here to represent my client, and I and my client are not participating in this proceeding . . . ."
> N/T 9 . . . . "We point out, and as I say not as a record of these pro-

ceedings, we are not participants in this hearing called today for two o'clock. And we point out the order which called this hearing for two o'clock is itself the subject of a pending appeal in the Superior Court of Pennsylvania."

"We are charged with nothing . . ." (N/T 10)

Apparently, the objective of Attorney Falkenhan was to attack the constitutionality of the "Protection from Abuse Act." It was reported that he had threatened the Pennsylvania State Police with civil actions for damages for making the arrest. Similar threats allegedly were made against District Justice O'Donnell for conducting the arraignment.

The Protection from Abuse Act provides:

Section 10 - 35 P.S. 10190 Contempt:

a. Upon violation of a protection order or a court approved consent agreement the court may hold the

defendant in indirect criminal contempt and punish him in accordance with law.

b. Notwithstanding any provision of the law to the contrary any sentence for this contempt may include imprisonment or a fine not to exceed $1000 or both and the defendant shall not have a right to a jury trial on such a charge.

c. An arrest for violation of an order issued pursuant to this act may be without a warrant upon probable cause whether or not the violation is committed in the presence of a police officer. The police officer may verify, if necessary the existence of a protection order by telephone or radio communication with the appropriate police department.

d. Subsequent to an arrest the defendant shall be taken without unnecessary delay before the court that issued the order. When that court is unavailable the defendant shall be arraigned before a district justice, or in cities of the first class the municipal court, in

accordance with the Rules of Criminal procedure. This section shall not be construed to in any way limit any of the other powers for emergency relief provided in this act.

As amended 1978, June 23, P.L. 513 No. 81 §1

There have been numerous Protection from Abuse cases in Butler County. There have been several prosecutions for violation of orders. Most have been settled before hearing. This is the first attack in Butler County on the procedure and the constitutionality of the Act.

The Court will attempt to outline the suggestions and demands made by Attorney Falkenhan and dispose of any that may still require an order.

1. The order of October 27, 1980, was appealed by James D. McDeavitt, Jr. to the Superior Court. No supersedeas was entered.

2. Robert L. Elliott, Pennsylvania

State Police, filed the "Indirect Criminal Contempt" charge before District Justice O'Donnell on information received. Although a standard criminal information form was used, the allegations clearly specify that the proceedings are under the Protection from Abuse Act. Defendant was informed of the charge upon which he was being arraigned. There is not and will not be a return by District Justice O'Donnell of any criminal action against James D. McDeavitt, Jr. based on the allegations contained in the information filed by Trooper Elliott.

3. Defendant was properly arraigned and advised of the charge without unnecessary delay. Defendant was entitled to a hearing on the merits before a judge. The hearing was scheduled for December 8, 1980, and the charge of "Indirect Criminal Contempt" was heard by the Court on that date. The alleged contemnor had no

right to a preliminary hearing. The procedure on a charge of indirect criminal contempt under the Protection from Abuse Act is discussed in a decision of the Superior Court. Cipolla v. Cipolla, Pa. Super. 308A2d 1053.

4. The Court refused the demand of Attorney Falkenhan that defendant be granted a jury trial. The Protection from Abuse Act specifically provides that a defendant is not entitled to a jury trial on a charge of contempt brought under this Act of Assembly.

The position of Attorney Falkenhan that the Protection from Abuse Act deprives his client of the right to a jury trial under the Pennsylvania and United States Constitution is without merit. The legal and constitutional rights of defendant were protected in this proceeding. The fact that defendant refused to participate in the proceed-

ings on the advice of Attorney Falkenhan constituted a waiver of defendant's basic rights. The hearing strategy appears to have been directed by Attorney Falkenhan to protect in some inexplicable manner his record position on the constitutional issue. The effect was to deny the defendant an opportunity to present facts on the contempt charge. The Court was permitted to hear only one side of the contempt charge.

5. Attorney Falkenhan presented no persuasive authority that the legal and constitutional rights of Mr. McDeavitt had been violated in any part of the proceedingss. Nor did Attorney Falkenhan offer convincing authority that the indirect criminal contempt provision of the Protection from Abuse Act was unconstitutional.

6. The affidavits and demands made by Attorney Falkenhan relative to obtain-

ing transcripts of the proceedings has become moot. Upon the filing of the appeal the Court ordered that the hearing be transcribed. The transcript has been filed.

The policy relative to obtaining transcripts of notes of testimony is well established in Butler County. (see memo to Court Reporters issued March 13, 1973) which is attached. The transcription of records of cases on appeal has priority. Next in the order of priority are transcripts ordered by the Court. Last to be transcribed are records privately requested by counsel or a party to a proceeding. The Court Administrator maintains the schedule for each Court Reporter so that the filing of transcripts is in compliance with the aforementioned policy. The policy was adopted to comply with the law and the rules as well as to expedite the business of the Court. Attor-

ney Falkenhan receives the same service in the preparation of transcripts as do other attorneys.

BY THE COURT,

George P. Kiester,
President Judge

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March 13, 1973

MEMO TO: Mr. Bayuszik, Mrs. Pease, Miss Harrison

FROM: George P. Kiester, President Judge

RE: Transcriptions

The rule controlling transcriptions is set forth in the following excerpts from a decision in the case of Neil and Jessie Atwell v Carl T. Sutton, A.D. #102, March Term, 1971, Book 96, Page 164 (Butler County).

"On a motion for a new trial, in general, the Court will not order the transcription of the testimony and the charge of the Court. The reason for the policy is to avoid unnecessary expense to the county, and to expedite the disposition of post-trial motions. An exception to the policy is when the Court is convinced that the

record or a part of the record is essential to post-trial disposition of exceptions. As a rule when this occurs, only a part of the record may be transcribed by Order of the Court.

"When an appeal is taken the record is transcribed forthwith at the expense of the County. Otherwise the County only pays for the transcript when the Court directs that the record be transcribed. (12 PS 1198). A party always has the right to request and obtain a transcript. However, the party must arrange to pay the official stenographer not only for that copy but also for the official transcript that is filed with the Court, plus the cost of the copy for the opposing counsel. See Shrum v. Pennsylvania Electric Co. 440 Pa. 383, 385 (1970)."

Upon inquiry by counsel as to the obtaining of a transcript refer to this memorandum and the explanation in the Atwell opinion.

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IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

PENNY JO NEMETH, Plaintiff

vs

DOUGLAS NEMETH, Defendant

A.D.79 - 1069

Book 116 Page 401

MEMORANDUM OPINION

On Friday, December 5, 1980, Penny Jo Nemeth, thru Neighborhood Legal Services petitioned the Court to order Douglas Nemeth to return custody to her of Jason Douglas Nemeth and Christine Nemeth by enforcing the custody order of March 5, 1980. Thereupon, the Court issued a rule on Douglas Nemeth to show cause why he should not be held in contempt for failure to comply with the order of March 5, 1980. The rule was made returnable at 9:00 o'clock A. M. on Monday, December 8, 1980. The Sheriff was ordered to produce the children before the Court at the stated time.

At the time scheduled for the return

of the rule Douglas Nemeth appeared with his attorney, Claude V. Falkenhan, witnesses and the children. Mr. Nemeth admitted that he refused to return the children to Mrs. Nemeth. Over the objections of Attorney Falkenhan, the Court restricted the hearing to the sole issue of whether Douglas Nemeth had violated the order of March 5, 1980. Mr. Nemeth was adjudicated in contempt of court, the children were returned to the custody of Mrs. Nemeth and Mr. Nemeth was ordered to post a bond of $1000 to insure future compliance with the March 5, 1980 order. Mr. Nemeth was committed to the Butler County Prison pending compliance with the bond requirement. There is nothing to indicate that Mr. Nemeth cannct post the bond.

The proceeding above described is largely a re-play of the events that preceded the entry of the order of

March 5, 1980. That record is in the Superior Court for review. The Opinion filed by this Court in support of the order of March 5, 1980, explains the problems created when a party can obtain a re-hearing on the merits of a custody issue simply by violating an existing Order of Court. This is a tactic employed by Attorney Falkenhan on behalf of clients with assistance by the Superior Court to the annoyance of opposing counsel and the disruption of the trial court.

If there had been a change of circumstances since the entry of the order of March 5, 1980, a petition reciting the facts and requesting a re-hearing should have been presented to the Court. Another course of action available to Mr. Nemeth was the filing of a complaint with the Children and Youth Agency upon evidence of child abuse or neglect. To permit

a party in a custody dispute to reverse, s
aside, or violate a custody order and be
rewarded with a re-hearing on the merits
when cited for contempt is not in the
interest of the administration of justice.
Such tactics are disruptive and should
not be encouraged.

The order of March 5, 1980, directed a re-hearing on the merits in six moths. As soon as home studies can be obtained such a hearing will be scheduled. Since September 1980, Butler County has been without personnel to conduct such investigations for the Court. Pending a re-hearing on the merits, the Court will enforce the order of March 5, 1980.

BY THE COURT,

George P. Kiester,
President Judge

Dated: December 19, 1980

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IN THE COURT OF COMMON PLEAS, BUTLER COUNTY, PENNSYLVANIA

PENNY JO NEMETH :
V : A. D. #79 - 1069
DOUGLAS NEMETH : Book 116

OPINION

In its order of March 5, 1980 the Court found that there had been no change of circumstances since the court order of November 19, 1979, made limited findings, briefly explained the rationale of the order, ordered protective supervision of the children, and deferred a final adjudication of what is in the best intersts of the children for a period of six months. In response to the "Motion for Adjudication" filed by counsel for Douglas Nemeth the following addenda is entered.

On a regular visitation on February 24, 1980 Douglas Nemeth phoned the mother and advised her that he was retaiing custody of their children, Christine,

age 2, and Jason Douglas, age 5. This action was taken on the advice of Attorney Claude V. Falkenhan. It violated an agreement between the parties dated November 5, 1979, and an order entered November 19, 1979 when Douglas Nemeth was represented by James A. Taylor, Esquire.

Penny Nemeth separated from Douglas Nemeth during the summer of 1979 and filed a Complaint in Divorce on September 14, 1979. She and the children moved into a small apartment only a short distance from the jointly owned marital residence. There had been no prior conflict between the parties over either custody or visitation with the children. Mr. Nemeth had exercised unlimited visitation. However, Mr. Nemeth continued to profess his love for Mrs. Nemeth and continuously urged her to return with the children to live with him.

On February 25, 1980, the day foll-

owing the "child-napping" the mother filed a petition for a writ of habeas corpus which was scheduled for daily motion court at 9:00 A. M. on February 26. At the same time Mr. Nemeth filed a "Petition to Confirm Custody." The parties with their attorneys and numerous witnesses were before the court at the stated time. When the record established that Mr. Nemeth was in violation of an existing court order the following Order was entered from the bench:

"AND NOW, February 26, 1980, the petition to confirm custody is denied without hearing. The Court finds that this is not proper procedure to determine custody or to protect the rights of the children.

The petition for a writ of habeas corpus is granted. It is ordered that the said Douglas Nemeth be taken into

custody and detained in the Butler County Prison until such time as the custody of the children is returned to Penny Nemeth under the order of November 19, 1979."

At the conclusion of motion court that lasted beyond the usual 30 minutes the judge resumed the trial of a personal injury case before a jury. Later, notice of an appeal from the order of February 26 was given, and this court denied Mr. Nemeth's application for a supersedeas. A supersedeas was granted by the Superior Court on February 29, with the entry fo the following order:

"AND NOW, to wit, this 29th day of February, 1980, upon Petition and Answer of counsel, and having conducted a hearing thereon, it is hereby ORDERED, ADJUDGED and DECREED, as follows:

Appellee's Petition to Quash the Application for Release Pending Appeal is

denied, and the case is remanded to the Court of Common Pleas of Butler County for a hearing within five days on Appellant's Petition to Confirm Custody, said Petition to be treated as a petition to change custody due to a change in circumstances relating to the welfare of the children.

Upon posting of a bond in the amount of Two Thousand Dollars ($2,000) with surety approved by the lower court, Appellant shall be released from custody, said release to be conditioned upon Appellant's production of the children in court at the aforementioned hearing.

Per Curiam

Montgomery, S. J. "

This judge received the order on Monday, March 3. In compliance with the order of the Superior Court a hearing was scheduled for 9:30 A.M. March 4. The cases scheduled for Summary Appeals

Court were continued to June 6, 1980, and Sentence Court was postponed. The ensuing confusion, the consternation, and the annoyance of many people was considerable.

The hearing ordered by the Superior Court consumed two days, commenced at 9:30 A.M. on March 4, and concluded about 4:00 P.M on March 5.

The facts developed at the hearing are that Mrs. Nemeth is a poor housekeeper, and that she wants her freedom from Mr. Nemeth. Mr. Nemeth continues to love Mrs.Nemeth, and to pursue her. He took the "child-napping" course of action with the sole objective of trying to force Mrs. Nemeth to return to him. Mrs. Nemeth neither harmed nor neglected the children. She loves the children and they love her as they demonstrated when they were returned to her following the hearing.(This was reported to the Court by the staff).

This court does not condone the conduct of Mrs. Nemeth. Her affairs with other men before and after the separation evidence her irresponsibility and are to be condemned. However, it is to her credit that she has not engaged her appetite for lovemaking in front of the children. She is a capable, strong-willed, and articulate young woman.

The reason for the rejection of Mr. Nemeth by Mrs. Nemeth, and the failure of this marriage does not appear of record. The letter of Attorney Criss dated July 27, 1979 contains one explanation, "This suffocating attention and unreasonable insistence that Penny be dependent upon him is probably the foremost reason why this marriage had disentegrated." (Defendant's Ex. 1).

Douglas Nemeth is a sincere, honest, and industrious gentleman. He has strong

convictions and a good character. There is convincing evidence that he has been and will continue to be a good father to his children. He does not appear to posess the weaknesses of his wife which this partial record establishes as immaturity, self-interest, and irresponsibility in the marital relationship.

The concern of the law and this Court is the best interests of the children. The children are in the middle of the parental conflict. They are being deprived of what should have been a normal happy homelife. Jason has been"orchestrated"and used. He is a victim and his sister may be the next victim. Only if the parties will conscientiously and whole-heartedly study and counsel can they hope to avoid in some measure inflicting upon Christine and Jason the destructively emotional and psychological impact that usually results from the separation and divorce of parents.

The families of both Mr. Nemeth and Mrs. Nemeth can help them in this respect.

There has been no change in circumstances from November 19, 1979 to the present that supports a change in custody. The Court retains jurisdiction and will conduct another hearing in six months to determine what may be in the best interests of these children at that time.

Attorney Claude V. Falkenhan has done his client, this Court, and his profession a disservice in this case. His "Motion to Confirm Custody" did not plead facts to support the allegation of harm to the children, nor was proof of harm established by substantial evidence. Attorney Falkenhan was aware that a complaint to the Children and Youth Agency of Butler County would have resulted in an immediate investigation and action by the Agency if the children had been harmed or threatened with harm.

The advice to Douglas Nemeth, combined with pleading an undescribed "harming of the children" and with an assist from the Superior Court, permitted a circumvention of the local procedural rules. In a congested court with insufficient judicial manpower the custody rules were promulgated to insure a speedy hearing before a Master. This practice has received a near unanimous acceptance and cooperation by attorneys practicing in Butler County. Parents can and do avoid open court confrontations, custody agreements are effected, issues are defined, and temporary orders are entered without prejudice pending a full and complete hearing. It is not unusual for custody hearings to consume two days or longer.

The tactics employed by Attorney Falkenhan may gain his client an expedited trial court and appellate court hearing. That result is not necessarily in the

best interest either of the children or of the parents. Delay in adjudication preceded by dialogue, counseling, investigation and conciliation may be preferable to speedier justice in custody cases.

The advice that Attorney Falkenhan gave Mr. Nemeth resulted not only in the violation of an agreement, and the disobeying of an order of court, but also the disruption of court and the procedures that have been adopted in the interest of jsutice and the processing of the work of an over-burdened and under-manned Court.

In the opinion of this Court the conduct of Mr. Falkenhan in this case has been non-professional and reprehensible.

BY THE COURT,
George P. Kiester,
President Judge

March 12, 1980.

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IN THE COURT OF COMMON PLEAS

BUTLER COUNTY, PENNSYLVANIA

GAIL E. MC DEAVITT, " F. C. No.80-1013

Plaintiff "(F.C.No.80-1013-A)

"

vs. "

JAMES E. MC DEAVITT,"

Defendant "

P R O C E E D I N G S

Before the

HONORABLE GEORGE P. KIESTER, P.J.

December 8, 1980
Monday Afternoon

Courtroom No. 2

Butler County Courthouse

Butler, Pennsylvania

A P P E A R A N C E S

FOR THE PLAINTIFF: THOMAS J. FOLAN, Esq.
820 Frick Bldg.
Pittsburgh, PA 15219

FOR THE DEFENDANT: CLAUDE V.FALKENHAN,Esq.
201 Spruce Street
Zelienople, PA 16063

Rebecca L. Courtney
Court Reporter

THE COURT: Very well, this is the time fixed for hearing on the charge that James D. McDeavitt committed an indirect criminal contempt by violating the

conditions of the order of October twenty-seven, nineteen eighty, entered under the Protection from Abuse Act.

You may call your witness.

MR. FOLAN: Thank you, Your Honor. Mrs. McDeavitt --

THE COURT: Well, we don't seem to have the defendant in court.

MR. FALKENHAN: Right here he is, Your Honor.

THE COURT: He may move up.

MR. FALKENHAN: We decline, Your Honor, thank you.

THE COURT: What is that?

MR. FALKENHAN: I say we decline.

THE COURT: You decline for what reason?

MR. FALKENHAN: Without going on the record of these proceedings, I and James McDeavitt doesn't-- the order under which this hearing is called is on appeal. The appeal was perfected with the Prothonotary.

THE COURT: We will excuse the children from the Courtroom.

MR. FOLAN: Notice of appeal was filed some time ago. I have no reason to believe the supersedeas was granted.

THE COURT: The court -- there has been no application for supersedeas. The court has granted no supersedeas. We will excuse the children from the courtroom.

This is totally contemptible, inexcusable, Mr. Falkenhan, to bring those children into this courtroom.

MR. FALKENHAN: As a separate record I will demand that if you -- (Mr. Falkenhan continues to speak at the same time as the court.)

THE COURT: This is totally incomprehensible to this court, and I want that noted on the record. The defendant James D. McDeavitt will be seated at the counsel table Let the record show that --

sit down. Sit down, Mr. Falkenhan.

MR. FALKENHAN: No, I will not, Your Honor, respectfully. I have my client's liberty to defend. He does not and I as counsel do not participate in these proceedings. You may do what you will, but if he moves forward to the bar it is under the force and compulsion of the law, physical force. And when he does, he does because you drag him and not because he participates in these proceedings.

THE COURT: Let the record show that Attorney Falkenhan has directed his client not to appear at the bar of this court as a participant in these proceedings.

Very well, gentlemen, place Mr. McDeavitt at the counsel table.

All right, Mr. Falkenhan, there will be no comments from you aside during this hearing. If you have remarks, you will address them to the court.

MR. FALKENHAN: I assure the court if I have remarks intended to address the court I will do so, Your Honor.

THE COURT: You will not from the position that you are in now. You will be silent through the entire proceeding.

Mr. McDeavitt, are you represented by counsel? Mr. Falkenhan, I told you to be quite (sic).

MR. FALKENHAN: I will defend the liberty of my client. And I will instruct him from here and I will not move forward to the bar of your court lest that implicate voluntary participation in this action. I have the liberty of my client to defend, and I will do so, Your Honor.

THE COURT: I told you you were not to address the court from that position. You will come to the bar of the court.

MR. FALKENHAN: Say nothing at all, ever, Jim.

THE COURT: Did you record that remark:

COURT REPORTER: Yes.

THE COURT: Be seated.

MR. FOLAN: Do you wish Mrs. McDeavitt to take the stand?

THE COURT: No. Well, come to the bar of the court, Mr. Falkenhan. Present yourself to the bar of this court.

MR. FALKENHAN: Your Honor, for what purpose?

THE COURT: For the purpose of answering the court's charge that you are in contempt of this court.

THE COURT: Mr. Falkenhan, you appeared in this courtroom --

MR. FALKENHAN: I respectfully dissent, Your Honor, I haven't appeared.

THE COURT: As a member of the audience not representing James D. McDeavitt who the record shows you do represent.

MR. FALKENHAN: That is so, Your Honor.

THE COURT: You have persisted in talking to your client and other people in the courtroom.

MR. FALKENHAN: I cite the case --

(Mr. Falkenhan continues to speak at the same time as the court.)

THE COURT: Over and above the statement of the court that you are to cease and desist talking unless you appear at the bar of the court representing your client. You have ignored the instructions of the court. Now, if you have any reason why the court should not hold you in contempt of this court so state it.

MR. FALKENHAN: Yes, I do, Your Honor, and that reason is the United States Supreme Court case of Maness versus Meyers decided this past summer. And if Your Honor will give me a minute I can get the citation. Suffice it to say it is law, and law before a higher court than Your Honor's. An attorney can never be held in contempt of court for advising his client not to testify and to assert his Fifth Amendment rights. And that is what I have done.

THE COURT: It appears that you have entered court today with the purpose of

interfering with the process that has been scheduled.

MR. FALKENHAN: I deny that on the record, Your Honor.

THE COURT: I have not had an opportunity to review this matter. It does appear that there was an arraignment before Magistrate O'Donnell, and Mr. McDeavitt was held for a hearing.

MR. FALKENHAN: Is Your Honor referring to Commonwealth versus James D. McDeavitt? That's the court case that we are here in court today.

THE COURT: This is the case under the Protection from Abuse Act.

MR. FALKENHAN: I know of only one such citation against him in a bona fide action, and that's entitled Commonwealth versus James D. McDeavitt. And there is such an action and it was instituted by Magistrate O'Donnell on November eighteen-

th. And James D. McDeavitt was charged with three separate violations on three separate dates in that process. This is an entirely different action in which we are called today. The violation of the Protection from Abuse Order entered October twenth-seventh, nineteen eighty, is yet a third action, but that is an entirely separate case, Your Honor. That is a separate criminal case.

THE COURT: Do I understand that you are not representing Mr. McDeavitt in this proceeding today?

MR. FALKENHAN: I am here to represent my client and I and my client are not participating in this proceeding. This action is in appeal, and not in the record of this action but merely for the purpose of an orderly explanation of what we do to demonstrate against any criminal or contempt charge. In good faith we do point out that this hearing has been

called in the case of Gail E. McDeavitt against James D. McDeavitt. That's one of three cases all docketed by your Prothonotary at the identical number which makes it very difficult to tell them apart. But if you look at the record of this case in which we are called to hearing today you will find no order ordering James McDeavitt to do or not to do anything. And you will find no charges against James D. McDeavitt that he has done anything reprehensible, anything worthy of punishment, anything worthy of the process of contempt.

Informally, in other actions I can cite Your Honor many Pennsylvania cases -- and Federal -- that say if you are to be threatened with punishment you must be told what you are charged with. We point out, and as I say not as a record of these proceedings, we are not participants in this hearing called today for two o'clock. And we point out the order which called

this hearing is itself the subject of a pending appeal in Superior Court of Pennsylvania.

We are charged with nothing. We would have no way of knowing what it is we are to come here to defend. And we are entitled first to be given the charges against us in any action in which we are called to defend anything. We believe this hearing was called in Gail E. McDeavitt versus James D. McDeavitt, one of the cases as F. C eighty dash ten thirteen. It calls for an indirect criminal contempt hearing. It doesn't even say what it might be against. That's supposedly for a hearing on indirect criminal contempt, but there is no order in that action a violation of which would give rise to any contempt proceeding, and there is no petition and no rule and no call to hearing and no rule absolute and no motion and opportunity to

to be heard and no due process whereby James D. McDeavitt might be told what it is the court has in mind in this proceeding today.

He appealed the court order that called for the proceeding, and he has a separate right quite apart from the right to have to defend anything until he is told what it is he is called to defend, but that is quite a separate right. And not to prejudice and perhaps destroy the appeal by voluntary participation at any time and upon my advise[sic], he is not a voluntary participant in these proceedings called in this matter of Gail E. McDeavitt versus James D. McDeavitt today and neither am I.

THE COURT: Do I understand then you are not representing Mr. McDeavitt in these proceedings:

MR. FALKENHAM: I represent Mr. McDeavitt at F. C. eighty dash ten thirteen that

I have just related. I represent James McDeavitt in the criminal action, and you will find if you look at the record of this action my entry of appearance.

THE COURT: If you wish to -- if you wish to represent Mr. McDeavitt in this hearing today you will be seated at counsel table.

MR. FALKENHAN: No, I don't, he and I are not participants. I represent Mr. McDeavitt in this action and my representation of this advice I give to him in this action is he should not participate in this hearing called this afternoon in this court in this action.

THE COURT: Very well, then, we will excuse you from the courtroom.

MR. FALKENHAN: Thank you.

HE COURT: Mr. McDeavitt, this is a criminal proceeding. You have a right to be represented by counsel. If you are without counsel and without funds to employ

counsel, upon application to the court, the court will appoint an attorney to represent you in these proceedings.

MR. FALKENHAN: I instruct you --

(Mr. Falkenhan continues to speak at the same time as the court.)

THE COURT: I have excused you from the courtroom, Mr. Falkenhan.

MR. FALKENHAN: I instruct my client--

THE COURT: You will leave the courtroom Mr. Falkenhan. You will be taken into custody.

MR. FALKENHAN: I instruct you not to answer any question and to assert to any question asked to you that it could be a violation --

THE COURT: The court finds Claude V. Falkenhan in contempt of this court. Take him into custody in the courtroom here until the court determines what to do with him.

The court is going to recess for ten minutes until I dispose of this particular matter.

Meanwhile, Mr. McDeavitt, you have the right to be represented by an attorney in this proceeding. If you are without funds to employ an attorney the court will appoint an attorney to represent you. Do you understand these rights?

Let the record show that the defendant refuses to answer.

Very well, court will recess for fifteen minutes.

(Recess taken from two thirty-seven until two: fifty p.m.)

THE COURT: Now you can proceed.

MR. FALKENHAN: I believe Your Honor had asked a question.

THE COURT: Do you wish to make a statement before sentence is imposed?

MR. FALKENHAN: Yes, I do. My first state-

ment is sentence will be highly improper, in error at this time. My second is that if you charge me with anything I demand a full and complete statement of what it is you charge me with. My third is that I demand adequate time to prepare my defense. My fourth is that I demand my liberty in the meantime.

And I remind you in the order of court as spoken of in the judicial code section I think you have before me -- or before you-- I remind you that you must demonstrate that I had in fact interfered with the process of court if you even intend to charge me with summary criminal contempt. But I demand of you what it is -- I demand through my advice and participation in counseling Jim McDeavitt this afternoon a statement of the charges against me, those and the opportunity to be heard. And I demand a jury trial of my peers because you have criminal contempt in mind.

I can only -- or at least I am entitled to suspect that because it carries the weightier penalties -- until you tell me what it is in fact you charge me with. I remind you also that I remain entitled to bail if you impose any sentence and punishment.

And I demand that, and more generally I demand all of what you know in your capacity as judge to be the criminal procedural rights, the criminal procedural rights in any charge against me and of every United State citizen and every Pennsylvania citizen.

THE COURT: The record speaks for itself, Mr. Falkenhan. You conduct in the court this afternoon has been contemptuous. You have interfered with the process of the court. You have instructed your client to sit in the courtroom but not take his position at the bar of the court. You continued to conduct conversations with your client and others in the courtroom.

You have interrupted the court. The record, the entire record speaks for itself.

The sentence of court is that you pay a fine of one thousand dollars for the use of the Commonwealth of Pennsylvania. You are committed to the Butler County Prison until such time as the fine has been paid.

MR. FALKENHAN: I demand to know now --

THE COURT: At such time as the fine is paid you will be discharged.

MR. FALKENHAN: I will pay you no fine because if I pay your fine I alleviate my demand. Instead I demand to know what amount of bail will secure my liberty. I remind you that I have the right to bail, and I remind you that if you attempt to deny bail you must state on the record your reason for denying me bail. I demand to know my bail.

THE COURT: The court fixes bail in this matter at one thousand dollars.

MR. FALKENHAN: Thank you, Your Honor.

THE COURT: Defendant stands committed.

Now, Mr. McDeavitt, I am going to repeat what I said before. You are entitled to be represented by an attorney in this proceeding. If you are without funds to employ an attorney upon application the court will appoint -- and proof of the fact of your indigency the court will appoint an attorney to represent you. Do you understand this?

The record will show that Mr. McDeavitt has refused to answer.

Very well. Counsel, you may proceed.

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IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

| | | |
|---|---|---|
| PENNY JO NEMETH, Plaintiff | ) | Civil Division |
| vs. | ) | A.D. 79-1069 |
| DOUGLAS NEMETH, Defendant | ) | Book 116 Page 401 |

P R O C E E D I N G S

Before the

HONORABLE GEORGE P. KIESTER, P.J.

March 4 - 5, 1980

Courtroom No. 2

Butler County Courthouse

Butler, Pennsylvania

(at page 63)

THE COURT: Was this the advice of Mr. Falkenhan that you could take these children in defiance of this Order and then a hearing would be obtained before a judge in which you would be able to state your reasons for taking the children?

THE WITNESS: This is the --

MR. FALKENHAN: I object to what happened to Mr. Nemeth. I instruct you not to answer on the grounds it may incriminate you.

THE COURT: This is not a criminal proceeding. Answer the question, Mr. Nemeth.

MR. FALKENHAN: Object to the characterizing, Your Honor, of defiance. That

characterizes it. That throws a legal conclusion that doesn't adequately bring out what was in his mind.

THE COURT: Mr. Falkenhan, you have raised the issue.

MR. FALKENHAN: Then I object to the nature of the question, You Honor, which I may due[sic] under rule.

THE COURT: Mr. Nemeth, did Mr. Falkenhan advise you to disregard the agreement and the Order signed by Judge Dillon?

MR. FALKENHAN: I instruct you not to answer as to intend to incriminate you. This is a criminal contempt.

THE COURT: Answer the question, Mr. Nemeth.

MR. FALKENHAN: I ask the question be re-phrased, undoubtedly it is misleading, it containeda legal conclusion as to defiance. It does not go to the fact. It reflects to the conclusion as well as the facts for one, it concludes that

it was defiance, it concludes that the issue is open and shut once the question has been resolved: Is there an Order, is this action consistent with it? It does not add that Mr. Nemeth understood that things which happened once an order, especially interlocutory of this nature, may modify the nature of compliance with it and may create a right to have those new circumstances reviewed and create a right and create a duty in a parent to proceed in a manner consistent with the protection of the children's welfare which this can be done and the right to do and following the doing. When characterizing immediately and conclusive defiance merely to act with knowledge, there is an Order somewhere from some Court that said otherwise, that is a legal conclusion, which I broke in on the question and I object to the question.

MR. CRISS: All the question really is what had Mr. Nemeth heard. I can't see how this implicates --

(Mr. Falkenhan began talking.)

MR. CRISS: -- what he heard from his attorney that was what the Court asked --

MR. FALKENHAN:-- this question is replete with the characterizing of the admission of guilt, because the question contains the word defiance, it is possible, it ought to be asked in a way it indicates that Douglas Nemeth understood that the action consistent with the Order did not per se constitute defiance, yes or no, to that question, is replete with the possibility of admitting defiance, which was not there. I ask the question to be rephrased.

THE COURT: Mr. Nemeth, the entire proceeding relative to you and the contempt is a civil matter --

MR. FALKENHAN: I object.

THE COURT: -- you are not --

MR. FALKENHAN: Objection.

THE COURT: -- involved in any criminal proceeding whatsoever. Mr. Falkenhan, if you do not cease and desist in talking when other counsel is talking or when the court is talking, the Court will take appropriate measures. Now, Mr. Falkenhan, you get yourself under control.

Mr. Nemeth, this is not a criminal proceeding. The clear issue in the case --

MR. FALKENHAN: Is Your Honor advising my client? It is my position and assurance he stands by the advice, takes its consequence. If Your Honor is advising my client, I object.

THE COURT: Again, will you keep quiet, Mr. Falkenhan, until I finish.

MR. FALKENHAN: I respectfully say when it comes to the protection of my client's best professional judgment, adverse to interest, I will respectfully say I will not, I will advise my client.

THE COURT: Mr. Nemeth, there is no threat of any criminal proceeding, you are not incriminating yourself. The question that the Court asks is not directed to what you have done. My question is this: Did you take the children into your own custody in violation of this Order on the advice of Mr. Falkenhan on his statement that you would be afforded a hearing before there could be any contempt proceeding?

MR. FALKENHAN: I object to the question. I instruct you not to answer the question. That is an issue in the case. And it is not resolved whether this is a criminal proceeding or a civil. And you have the right not to answer it. But, that question, I advise you to answer.

MR. CRISS: Your Honor, may I say certainly this is the issue in the case that what we are here for on testimony on the issue of --

MR. FALKENHAN: I object. Whether a

criminal or civil proceeding, when I was told you are not in a criminal proceeding, that remains a live issue, it remains a disposition by the Court above. When you are told it is not a criminal proceeding, it does not mean that you cannot go to jail as you did last week. There are penalties you might face even allowing yourself to force an answer to improper questions. That last question was proper. I advise you that you may answer it.

THE WITNESS: I have to ask the Court to repeat the question. Everybody has been talking at the same time.

THE COURT: Did you get very confused from all of it, Mr. Nemeth?

THE WITNESS: Right now, yes.

THE COURT: Read back the question.

(Question read.)

THE COURT: You may answer that.

THE WITNESS: I still do not understand the way the question should be answered.

THE COURT: Did you consult with Mr. Falkenhan before you --

MR. FALKENHAN: I will stipulate what my advice was to resolve this.

THE COURT: Very well, put it on the record.... (at page 69) .....

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IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

GAIL E. McDEAVITT — FAMILY DIVISION

Vs. — F.C. 80-1013-A

JAMES E. McDEAVITT

ORDER OF COURT

AND NOW, November 25, 1980 an indirect criminal hearing on James D. McDeavitt is this day scheduled for December 8, 1980 at 2:00 p.m. o'clock in Court Room No. 1.

A copy of this order shall be served upon Attorney Claude Falkenhan and Attorney Thomas Folan.

BY THE COURT,

John C. Dillon
Judge

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IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA
CIVIL DIVISION

| | | |
|---|---|---|
| GAIL E. McDEAVITT, Plaintiff | ) | |
| vs. | ) | No. F.C. 80-1013A<br>F.C. 80-1013 |
| JAMES D. McDEAVITT, Defendant | ) | |

MOTION TO VACATE ORDER

Defendant James D. McDeavitt respectfully represents that:

1. An Order entered in the captioned action November 25, 1980 setting an "indirect criminal hearing" for December 8, 1980, 2 o'clock P.M., Court Room No. 1.

2. There is no order in the captioned action, violation of which would support or give rise to an "indirect criminal hear-

ing", or any kind of criminal proceeding.

3. There are no such pleadings in the captioned action as would be necessary process preliminary to any "indirect criminal hearing" or any criminal proceeding.

4. There is only one Order entered in the cluster of cases, all docketed at F.C. 80-1013, whether with or without any additional or final letters or digits, or both, violation of which could give rise to any "indirect criminal hearing" or any sort of criminal proceeding, including a proceeding for indirect criminal contempt. That is the Order entered October 27, 1980, in the case captioned James D. McDeavitt, Jr., vs. Gail E. McDeavitt, F.C. No. 80-1013. Record of the entire case so captioned, including that Order is herein incorporated by reference.

5. There is in all the records of Court of Common Pleas of Butler County, Pennsylvania, only one allegation that

defendant has ever violated the incorporated Order of October 27, 1980, described in the immediate preceding paragraph. That allegation is embodied in a criminal action captioned Commonwealth of Pennsylvania vs. James D. McDeavitt, Jr., begun November 18, 1980, under Complaint No.A 36754, issued by District Justice William R. O'Donnell, Magisterial District 50-1-01. The entire record of that criminal action is also herein incorporated by reference but for the convenience of the Court Defendant recites that the several violations of the October 27 Order charged in that criminal action are alleged to have occurred on November 15, 17, and 18, all 1980. If the Court, in entering the November 25, 1980 Order in the captioned action, has in mind to entertain charges of violation of the incorporated October 27, 1980, Order, it will be placing Defendant twice in jeopardy of the penalties of law for

any such violations which may be found to have occurred.

6. James D. McDeavitt, also called James D. McDeavitt, Jr. in others of the actions all docketed at F. C. 80-1013 before this Court, hereby reaffirms, what the court's records affirmatively show, that he does not understand that the purpose of the "indirect criminal hearing" scheduled by Order of November 25, 1980, in the captioned action, is for the purpose of entertaining alleged violations of the incorporated October 27, 1980, Order.

7. Defendant James D. McDeavitt hereby states that it is impossible to know, from a consideration of the Court's records, and that he does not in fact know, just what is the subject of the "indirect criminal hearing" set in the captioned action by Order of November 25, 1980.

WHEREFORE, because it is impossible

to understand both by its terms and in light of the entire record of the captioned action, and because, if it means what he suspects it may have been intended to mean, it would put him twice in jeopardy of punishment by the criminal law for the same alleged violations, Defendant hereby moves the Court to vacate the Order entered in the captioned action on November 25, 1980.

dated November 28, 1980.

Respectfully submitted,

Claude V. Falkenhan, Attorney
for Defendant

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IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

CIVIL DIVISION

PENNY JO NEMETH, Plaintiff

vs.

DOUGLAS NEMETH, Defendant

A. D. No.79 - 1069
Book 116, Page 401

MOTION ADDRESSED TO THE HONORABLE GEORGE P. KIESTER, P.J., TO RECUSE AND DISQUALIFY HIMSELF FROM FURTHER PARTICIPATION IN THIS ACTION

The Motion of Defendant Douglas Nemeth represents that:

1. DEFENDANT'S MOTION TO THE HONORABLE GEORGE P. KIESTER, P.J., TO RECUSE HIMSELF FROM FURTHER PARTICIPATION IN THE PROCEEDING NOW BEFORE THE COURT IN THIS ACTION, filed of record in this case March 5, 1980, is herein incorporated and is hereby RENEWED.

2. The Contempt proceedings now before the court involve the custody of his children,and the Honorable George P. Kiester has abdicated his duty alone to decide issues of the custody of children brought before him, and not to delegate any part of that duty to decide. That duty is part of the present (Pa.R.C.P. Nos. 1920.32, 1920.51, 1514; and Commonwealth Child Custody Jurisdiction Act and Uniform

Child Custody Jurisdiction Act) and former (Pa.R.C.P. No. 1133(a)(1) and all the other authorities cited immediately above except for the new Divorce Rules, Pa.R.C.P. Nos. 1920.32 and 1920.51) law of Pennsylvania. Instead, in clear violation of Pennsylvania law, and of his duties to Defendant Douglas Nemeth and through said Defendant to the children of both Defendant and Plaintiff in this action, the Honorable George P. Kiester is signatory to the ORDER OF COURT PROCEDURAL RULES RELATIVE to CUSTODY of the Court of Common Pleas of Butler County Pennsylvania, promulgated November 24, 1978, over the signatures of the said George P. Kiester, President Judge, and John C. Dillon, Judge, of the captioned court, printed and published in the Butler County Legal Journal, Vol. 6, No. 141, December 15, 1978. That Order and the scheme of decisions of custody therein set out

affirmatively delegate the Court's duty of custody decisions to a non-judge lawyer, in clear violation of the law of Pennsylvania and of Defendant's and his children's rights thereunder.

3. On December 5, 1980, in open Court and by Order of that date in the captioned action, the Honorable George P. Kiester further abandoned his duty to decide issues of the custody of children brought before him, in that on that date the Honorable George P. Kiester delegated the decision of the custody of Defendant's children to Robert L. Watson, Sheriff of Butler County.

WHEREFORE, and because Judge Kiester refuses to obey the law of Pennsylvania in deciding the custody of Defendant's children, and in the derivative issues of enforcement of custody orders entered in the captioned action, Defendant moves the Honorable George P. Kiester to recuse

and disqualify himself from further proceedings in this action.

Dated: December 8, 1980.

Claude V. Falkenhan, Attorney
for Defendant Douglas Nemeth

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IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

| | | |
|---|---|---|
| PENNY JO NEMETH, Plaintiff | ) | |
| vs. | ) | A.D. No. 79-1069 |
| DOUGLAS NEMETH, Defendant | ) | Book 116 Page 401 |

AFFIDAVIT

Commonwealth of Pennsylvania)
County of Butler ) SS:

Personally appeared before me, a notary public in and for said County and Commonwealth, Claude V. Falkenhan, Jr., known to me, who, being duly sworn according to law, deposes and says that on Wednesday, December 3, 1980 he made inquiry of

Court Reporter Edward Bayuszik of the captioned court requesting to know the cost of, and the required deposit for, preparation of a transcript of the trial of a certain case, Commonwealth v. Rickie J. Thompson, C.A. No. 308 of 1978; and further deposes and says that he indicated to the said Court Reporter his intention to request preparation of such transcript; and that he called the attention of Mr. Bayuszik to the Uniform Rules Governing Court Reporting and Transcripts, published by the Pennsylvania Court Administrator, Saturday, March 22, 1980, in the Pennsylvania Bulletin, Vol. 10, No. 12, of which Mr. Bayuszik then and there had a copy to which Mr. Bayuszik again referred; that affiant indicated that those Rules, which were published in binding and not in conditional or proposed form, created a right in all persons, that is, a right not even restricted only to the parties to actions,

to secure copies, in the form of transcripts readable by persons who read the English language but cannot read the notes of court reporters, of the public proceedings before the captioned court of which Court Reporters, in the first instance, create and preserve the public's record; that the said Edward Bayuszik indicated to affiant that he would require some brief time to refer to his notes of testimony in order to estimate the cost of preparation of a transcript of the trial of the said case; that the said Court Reporter thereafter, in the presence of Mrs. Delores Bradrick, law librarian of Butler County, indicted to affiant that he had conferred with Judge John C. Dillon of the captioned court, and that he, Mr. Bayuszik, had been ordered by the said Judge Dillon not to disclose to affiant the cost of preparation of such transcript, and that Judge Dillon further had then and there indicated to

Court Reporter Bayuszik that Mr. Bayuszik was forbidden to prepare the said transcript without the prior affirmative permission of Judge Dillon. Affiant further deposes and says that on December 3, 1980, the said Court Reporter, Mr. Bayuszik, again confirmed to affiant upon affiant's inquiry that Mr. Bayuszik understood that he, as Court Reporter was forbidden by unwritten order of the captioned Court to transcribe into readable form the notes of testimony of any proceeding in or for the captioned court without the prior affirmative permission of one of the permanent Judges of said court, and that said Court Reporter considered himself bound by, and intended to obey, that order.

Affiant further deposes and says that on December 1, 1980, Lynda Harrison, Court Reporter of the captioned Court, confirmed to affiant upon affiant's inquiry

that she also understood that she, as Court Reporter, was forbidden to transcribe into readable form the notes of testimony of any proceeding in or for the captioned court without the prior affirmative permission of one of the permanent Judges of the captioned Court, hat she considered herself bound by said order, and that she intended to obey said order.

Affiant further deposes and says that on December 3, 1980, Virginia Pease, Court Reporter of the captioned Court, confirmed to affiant upon affiant's inquiry that she also understood that she was forbidden to transcribe the notes of testimony of any proceeding in or for the captioned court without the prior affirmative permission of one of the permanent Judges thereof, that she had never been so forbidden in writing, and was unaware of any written order of court, policy, directive, or any other writing, embodying such for-

biddance, that she had been orally so forbidden by Judge John C. Dillon of the captioned court, and by its Court Administrator Ms. Bette McAnany, who gave Court Reporter Pease to understand that such forbidding was at the order of the said Judge Dillon, and that she was most recently so forbidden about a month before December 3, 1980, and that she considered herself bound by, and intended to obey, the order not to transcribe any proceedings in or for the captioned Court without the prior affirmative permission of one of the permanent Judges thereof.

And further deponent says naught.

SIGNED

Claude V.Falkenhan, Jr.

SWORN TO AND SUBSCRIBED before me this 6th day of December 1980

Ann W. Falkenhan
Notary Public My commission expires
Feb. 18, 1984

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee,
vs.
CLAUDE V. FALKENHAN,
Appellant

No.332 W.D.
Allocatur
Docket 1982

NOTICE OF APPEAL

Notice is hereby given that Claude V. Falkenhan, Appellant above-named, hereby appeals to the Supreme Court of the United States from the final Order entered in this matter, March 24, 1983, denying hearing of appeal.

Thise appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph (2).

Claude V. Falkenhan, Pro Se
201 Spruce Street
Zelienople, Pa. 16063
(412) 452-5181

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This NOTICE OF APPEAL was filed by mailing June 6, 1983, by first class mail to the Prothonotary of Pennsylvania Supreme Court, 801 City-County Building, Pittsburgh, Pennsylvania 15219

and to the Prothonotary of Butler County Common Pleas Court, Courthouse, Butler, Pennsylvania, 16001, since the Butler County Court now has the record.